Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

KEELEY TATSUYO HUNTER, a minor,
by GINA F. BRANDT, her mother and next friend,
Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and THEODORE R. MITCHELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Based on its assumption that children of different races possess different "learning styles," the University of California operates a research-oriented elementary school that explicitly selects its students on the basis of their race, not for the purpose of remedying past discrimination, but to achieve a preferred racial population profile.

1. Is a state's interest in operating a research-oriented elementary school sufficiently compelling under the Equal Protection Clause of the Fourteenth Amendment to justify the selection of students on the basis of their race?

2. In the absence of any supporting empirical data, does a race-based admissions policy based on the stereotype assumption that different races have different learning styles violate the Equal Protection Clause of the Fourteenth Amendment?

3. May a court employing strict scrutiny to review a public school's race-based classifications defer to the school's determination as to the necessity and narrow tailoring of those measures?

PARTIES TO THE PROCEEDING

The parties listed in the caption and no others were parties to this action in the United States Ninth Circuit Court of Appeals. No parent companies or subsidiaries of any kind are involved in this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AT ISSUE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 6

I. THE NINTH CIRCUIT RULING CONFLICTS WITH THE RULINGS OF THIS COURT AND THE RULINGS OF OTHER CIRCUITS 6

A. The Ninth Circuit Ruling That an Amorphous Interest in Educational Research Justifies the Use of Racial Classifications Is Fundamentally Inconsistent with This Court's Equal Protection Rulings 6

B. The Ruling That Educational Research Allows the State to Use Race as a Factor in Providing Public Benefits Conflicts with the Decisions of Other Circuits 9

II. THE NINTH CIRCUIT'S RULING THAT RACE QUOTAS IN SCHOOL ADMISSIONS CAN BE JUSTIFIED BY THE ASSUMPTION OF VALIDITY OF RACIAL STEREOTYPES AS TO "LEARNING STYLES" CONFLICTS WITH THE RULINGS OF THIS COURT AND THE RULINGS OF OTHER CIRCUITS 15

TABLE OF CONTENTS—Continued

Page

A. The Ninth Circuit's Assumption of the Validity of Racial Stereotypes to Justify the Use of Race Quotas Conflicts with the Rulings of This Court 15

B. The Ninth Circuit's Reliance on an Assumption of the Validity of Racial Stereotypes to Justify Race Quotas Conflicts with the Rulings of Other Circuits 18

III. THE NINTH CIRCUIT'S EXPLICITLY DEFERENTIAL REVIEW OF THE NECESSITY AND TAILORING OF RESPONDENTS' RACIAL QUOTAS CONFLICTS WITH THIS COURT'S DECISIONS AND THE DECISIONS OF NUMEROUS COURTS OF APPEALS 20

A. The Ninth Circuit's Deferential Review of Race-Based Issues Conflicts with This Court's Decisions 20

B. The Ninth Circuit's Deference on Race-Based Issues Conflicts with the Decisions of Other Circuits 22

C. The Ninth Circuit's Rejection of Race-Neutral Alternatives Conflicts with the Decisions of This Court and Numerous Courts of Appeals 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 20-21, 26-27

Aiken v. The City of Memphis, 37 F.3d 1155 (6th Cir. 1994) 11

Associated General Contractors of Ohio, Inc. v. Drabik, No. 98-4393, 2000 U.S. App. LEXIS 12006 (6th Cir. June 1, 2000) 23, 25, 27

Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996) 12-13, 19, 25

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 16

Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997) 25, 27

Fullilove v. Klutznick, 448 U.S. 448 (1980) 6, 9

Hayes v. North State Law Enforcement Officers Association, 10 F.3d 207 (4th Cir. 1993) 19, 25-27

Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 10

In re Birmingham Reverse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994) 12

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) 21

Little Rock School District v. Mauney, 183 F.3d 816 (8th Cir. 1999) 23

TABLE OF AUTHORITIES—Continued

Page

Lutheran Church-Missouri Synod v. Federal Communications Commission, 141 F.3d 344 (D.C. Cir. 1998) 12

McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998) 14

Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990) 5-6, 18

Miller v. Johnson, 515 U.S. 900 (1995) 15-16, 18, 21-22

Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991) 11

O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992) 12

Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) 11

Police Association of New Orleans v. City of New Orleans, 100 F.3d 1159 (5th Cir. 1996) 10

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 16, 22

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... passim

Shaw v. Hunt, 517 U.S. 899 (1996) 8, 15

Shaw v. Reno, 509 U.S. 630 (1993) 8-9, 15

Taxman v. Board of Education, 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997) 13

TABLE OF AUTHORITIES—Continued

Page

Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999) 10-11, 19-20

United States v. Virginia, 518 U.S. 515 (1996) 21, 27

University of Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. 182 (1990) ... 21-22

Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996) 23

Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999) 27

Washington v. Glucksberg, 521 U.S. 702 (1997) 28

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) 14, 18-19, 22-24

Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) 13-14

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 6-9, 11

United States Constitution

Fourteenth Amendment 1-2, 8, 15

Statutes

28 U.S.C. § 1254(1) 1

§ 1291 1

§ 1331 1

§ 1367 1

42 U.S.C. § 1983 1-2

§ 2000d 1-2

TABLE OF AUTHORITIES—Continued

Page

Rules

Supreme Court Rule 10(a) 14, 20, 29

Rule 10(c) 9, 18, 29

Miscellaneous

Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis,* 85 Cal. L. Rev. 297 (1997) 14

Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms,* 16 Yale L. & Pol'y Rev. 59 (1997) 14

Note, *Racial Classifications Under Strict Scrutiny,* 7 Tex. L. Rev. 259 (1998) 14

Note, *Transracial Adoption and the Federal Adoption Subsidy,* 17 Yale L. & Pol'y Rev. 201 (1998) 14

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 190 F.3d 1061 (9th Cir. 1999), and is reproduced as Appendix A. The decision denying rehearing is not reported and is reproduced as Appendix B. The decision of the district court is reported at 971 F. Supp. 1316 (C.D. Cal. 1997), and is reproduced as Appendix C. Page references are to the version in the appendix.

JURISDICTION

This action was filed in the United States District Court for the Central District of California. That court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367 in that plaintiff alleged a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 42 U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution. The district court entered final judgment for defendants on July 16, 1997. Jurisdiction in the Court of Appeals was proper pursuant to 28 U.S.C. § 1291. The decision of the United States Ninth Circuit Court of Appeals, review of which is sought in this petition, was filed on September 9, 1999. A timely petition for rehearing was filed on September 22, 1999, and was denied on April 20, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Keeley Tatsuyo Hunter (Petitioner), then a four-year-old girl of Asian and Caucasian ancestry, filed this action

'against Respondents Regents of the University of California (Regents) and Theodore R. Mitchell (Mitchell) (collectively, Respondents) in the United States District Court for the Central District of California. Petitioner alleged that Respondents violated her rights under the Fourteenth Amendment Equal Protection Clause, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, and 42 U.S.C. § 1983,[1] by utilizing race quotas in denying her admission to the 1995-96 term of the Corinne A. Seeds University Elementary School (UES). Appendix (App.) C:2-3.

UES is a laboratory school operated by the Graduate School of Education and Information Studies (GSE) at the University of California, Los Angeles (UCLA), a public university operated by Respondent Regents; during all times relevant here, Respondent Mitchell was Dean of the GSE and director of the UES Admissions Committee. App. A:2-3. UES is located in the upscale Westwood area of Los Angeles, App. A:10, and has approximately 460 students between the ages of 4 and 12. App. C:3. UES' stated mission is to conduct research relevant to primary education in urban areas and to disseminate the results of that research in the hopes of promoting more effective elementary education in urban areas. *Id.* Because UES affords its students an excellent education, admission to it is highly coveted.

After a two day bench trial, the district court entered its Trial Order Re: Findings of Fact and Conclusions of Law. App. C. The district court found that in selecting students to be admitted to the UES program, the school sorted all applicants into six racial categories: African-American, Asian-American, Native American, Latino, Caucasian, and Other (Mixed Race). App. C:7. UES also admits a number of students each year, at

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[1] The courts below considered only the Fourteenth Amendment claim.

the discretion of the GSE Dean (called "Dean's Admits") "to further the mission of UES and to advance the interests of UCLA, including recruiting faculty and staff for the University." *Id.*[2] Because each applicant's chances for admission were necessarily benefited or disadvantaged by his or her race, strict scrutiny of UES' "racial targets" was required. App. C:12-13. The court further found: "The Admissions Committee's ethnic and racial target preferences undoubtedly influenced Plaintiff's chances for admission." App. C:14. The district court rejected Petitioner's argument that remedying past discrimination is the only compelling state interest that will justify racial classifications. App. C:15, 20. Instead the court found: "The defendants' interest in operating a laboratory elementary school is only analogous to the use of racial quotas to remedy the effects of past discrimination in that both forms of discriminatory categorization are a necessary instrumentality by which to achieve a beneficial societal goal–in this case, improved urban education." App. C:21.

The district court found that in order for UES to carry out its research mission it must be permitted to admit a student population that presents similar issues and challenges that arise in the ethnically diverse student population now present in the urban school community. App. C:24. Those issues and challenges included "limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children." *Id.* The district court found that these factors constituted a compelling state interest sufficient to justify UES' race-conscious admissions policy. App. C:31.

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[2] The use of these "Dean's Admits" shows that UES was used not only for research but for recruiting faculty and staff and for fundraising through the perquisite of a superb education.

A divided panel of the court of appeals affirmed. App. A. The majority first held that Respondents' concededly nonremedial "interest in operating a research-oriented elementary school is compelling." App. A:4 n.3, 6 (internal quotation omitted). The majority based its conclusion on the conclusory statements of two UES administrators that urban education was a pressing problem and that UES was performing research in that area. It did not consider whether UES' research actually improved urban education. *Id.* at 5-6.[3]

The majority rejected Petitioner's initial claim that only an interest in remedying past discrimination can justify the use of race as a factor in a school admissions process. App. A:6 n.6. On the crucial issues of the necessity of racial quotas and narrow tailoring, the majority admonished "courts [to] defer to researchers' decisions about what they need for their research." App. A:10. Reviewing the adequacy of the evidence *de novo*, App. A:4, the majority agreed with the district court that it would "'not be possible . . . to obtain an ethnically diverse representative sample of students without the use of specific racial targets.'" App. A:10. In explicit deference to Respondents' judgment, the majority summarily rejected the various race-neutral alternatives proposed by Petitioner and the dissent (such as conducting research in existing public schools with the desired naturally occurring student diversities) stating that those alternatives "would not address UES's need to maintain the representative sample" in its Westwood facility. *Id.* The majority did not address whether UES had considered race-neutral alternatives before adopting racial admissions quotas.

Judge Beezer dissented, stating that the majority opinion "reflects a disquieting renewed tolerance for the use of race in governmental decisionmaking." App. A:12. Surveying

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[3] Indeed, Respondent Mitchell admitted no such improvement could be established. Appellant's Excerpt of Record 237:24-241:6.

modern equal protection law, Judge Beezer concluded that "because racial classifications are 'potentially so harmful to the entire body politic,' the Supreme Court has only tolerated them in carefully defined remedial contexts." *Id.* at 22 (quoting *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)). He found that UES' interest in "educational research" suffered from the same flaws that has caused this Court to reject other nonremedial rationales. Because the "educational interest" rationale was not tied to correcting identified past discrimination, it had no viable limiting principle and may be expanded beyond any reasonable limits which would "'justify race based decisionmaking essentially limitless in scope and duration.'" App. A:18 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (plurality opinion).

Judge Beezer also concluded that UES' race-based admissions policy was not narrowly tailored. Noting that UES had failed to identify the level of diversity it needed to perform research, Judge Beezer concluded that its "need for some undefined level of racial/ethnic diversity . . . bears scant relation, let alone the constitutionally required 'exact connection' to the use of a racial/ethnic quota system." App. A:38. Although UES' admission policy was based on the presumption that "a child's race and ethnicity is somehow linked to a distinct 'learning style'" worthy of study, *id.* at 31, he saw no record evidence showing a connection "between any particular race/ethnicity and any particular learning style." *Id.* Finally, Judge Beezer noted that UES had failed to take into consideration obvious race-neutral alternatives such as those proposed by Petitioner. App. A:33-36.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT RULING CONFLICTS WITH THE RULINGS OF THIS COURT AND THE RULINGS OF OTHER CIRCUITS

A. The Ninth Circuit Ruling That an Amorphous Interest in Educational Research Justifies the Use of Racial Classifications Is Fundamentally Inconsistent with This Court's Equal Protection Rulings

The Ninth Circuit ruling that Respondents' concededly nonremedial interest in educational research permits the use of race in a school's admissions process fundamentally conflicts with this Court's holdings that only carefully defined remedial interests will justify use of racial classifications. This Court has counseled caution in finding governmental interests to be sufficiently compelling to justify use of racial classifications. "The history of governmental tolerance of practices using racial or ethnic criteria . . . must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications." *Fullilove v. Klutznick*, 448 U.S. 448, 486-87 (1980) (plurality opinion). Accordingly, restraint is warranted in "extend[ing] the justifications that might support racial classifications, beyond that of remedying past discrimination." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. at 613 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).

Thus, in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275-76 (1986) (plurality opinion), this Court rejected an asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination." *Id.* at 274. That interest was found to be "too amorphous a basis for

imposing a racia[l] classifi[cation]." *Id.* at 276. In addition, because the role model theory was not tied to remedying past discrimination, it "ha[d] no logical stopping point" (*id.* at 275) such that racial classifications based on it would be "ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276.

In *Croson*, a plurality of this Court held that race classifications are justified only when used to remedy the effects of racial discrimination. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, there held:

> [C]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

488 U.S. at 493. Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb – for example, a prison race riot, requiring temporary segregation of inmates – can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens . . . ."

Id. at 521 (citations omitted).

Because UES' purported interest in operating a research-oriented elementary school is neither remedial nor necessary to prevent imminent danger of life and limb, the Ninth Circuit's decision is inconsistent with the holding of the Court in *Croson*.

The Ninth Circuit's ruling is also inconsistent with this Court's precedents because it approved an interest that is every bit as "amorphous" as the role-model rationale rejected in *Wygant*. Unlike programs enacted to further a remedial interest, whose breadth and duration must be narrowly tailored to address specific and measurable incidents of discrimination, the inherent "indefiniteness" (*Wygant*, 476 U.S. at 276 (plurality opinion)) of UES' interest in conducting educational research could easily "justify racebased decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498 (plurality opinion). Because schools will never be perfect, a state could always benefit from more "educational research," and thus the interest would always support extension of race-based admissions to more laboratory schools and always support the continuation of laboratory programs indefinitely into the future. The interest recognized by the Ninth Circuit is not only open-ended, it is also entirely free-floating, because it is not even tied to any showing of actual improvements in educational method.[4] Thus, as the dissent below concluded, "[b]ecause an 'educational research' justification contains no viable limiting principle, it may be expanded beyond any reasonable limits." App. A:27 (internal quotation omitted). The Ninth Circuit's holding thus leads to the perverse result that a nonremedial racial classification will see far wider application than remedial programs that are tied to the Fourteenth Amendment's "central purpose" of "eliminat[ing] racial discrimination." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996).

Shaw v. Hunt, 517 U.S. at 909, held that any governmental entity seeking to classify by race must point to specific, identified instances of past or present discrimination for which that governmental entity has been either actively or passively responsible. *Shaw v. Reno*, 509 U.S. 630 (1993), explains the rationale for this requirement in the clearest of terms:

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[4] See note 3, *supra*.

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.

Id. at 658.

The Ninth Circuit ignored this warning and cited with apparent approval the district court's conclusion that it would not be possible, nor reasonable, to require the Respondents "to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications." App. A:10.

The Ninth Circuit's approval of racial quotas for the purpose of educational research violates the fundamental principle of equal protection. As Justice Potter Stewart declared, the government may never engage in "the practice of racism–not even . . . as an 'experiment.'" *Fullilove v. Klutznick*, 448 U.S. at 532 (Stewart, J., dissenting). The mantra of research purposes cannot rationalize the state's selection of children for inclusion in, or exclusion from, school on the basis of their race. The Ninth Circuit decision thereby conflicts with *Wygant, Shaw,* and *Croson*, necessitating review to secure conformity with Supreme Court decisions. Supreme Court Rule 10(c).

B. The Ruling That Educational Research Allows the State to Use Race as a Factor in Providing Public Benefits Conflicts with the Decisions of Other Circuits

The Ninth Circuit decision that a remedial interest is not required for racial classifications presents an issue of exceptional importance that conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue. In his dissent, Judge Beezer noted, App. A:19, that

> six of our sister circuits . . . have definitively held that racial classifications may only be used for the purpose of remedying racial discrimination.

In *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the Fifth Circuit considered the constitutionality of the University of Texas Law School's race-based admissions program, which was enacted to further the nonremedial goal of "obtaining the educational benefits that flow from a racially and ethnically diverse student body." 78 F.3d at 942 (internal quotation omitted). Relying on *Croson*, the Fifth Circuit held that the program did not survive strict scrutiny because "non-remedial state interests will never justify racial classifications." *Id.* at 944. In accordance with this Court's admonitions in both *Croson* and *Fullilove*, the court noted the dangers of even "benign" nonremedial racial classifications counseled in favor of restricting their use to remedial settings.

The Fifth Circuit reaffirmed *Hopwood* in *Police Association of New Orleans v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996). There the court struck down a nonremedial race-based program that sought to increase the number of African-American police in supervisory roles to promote more effective policing, on the theory that "more African-American supervisors could better supervise African-American officers who in turn [are] needed to relate to the larger African-American population." *Id.* at 1168 (internal quotation omitted). Although noting the "validity of the City's goal" in the abstract, the court held that interest would not "justify a racial classification" because equal protection law dictated that a racial classification "must be narrowly tailored to remedy past specific instances of discrimination." *Ibid.*

In *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999), the issue was "whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body." *Id.*

at 700. The constitutionality of using race preferences in a quest for student body diversity is the issue in the instant case. But unlike the Ninth Circuit, the Fourth Circuit held: "Such nonremedial racial balancing is unconstitutional." *Id.* at 705.

The Fourth Circuit further held in *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992):

> Classification based upon race must be justified by specific judicial, legislative, or administrative findings of past discrimination. . . . It is the state that must show the existence of prior discrimination, and a strong evidentiary basis for concluding that remedial action is necessary.

Citing *Croson*, 488 U.S. at 497 and 500.

The Sixth Circuit declared in *Aiken v. The City of Memphis*, 37 F.3d 1155, 1162-63 (6th Cir. 1994):

> "[A] state actor possesses a compelling state interest when its concern is with remedying past discrimination." [Citation omitted.] But the existence of societal discrimination alone cannot support a racial classification; rather, the Supreme Court "has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274.

The Seventh Circuit pointed out in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419, 422 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991): "The whole point of *Croson* is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination . . .; only a purpose of remedying discrimination against minorities will do so."

The Eleventh Circuit held in *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1544 (11th Cir. 1994), that under strict scrutiny analysis, "the racial classifications must be necessary and must be narrowly tailored to achieve the goal of remedying the effects of past discrimination."

The District of Columbia Circuit held in *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992), that "racially-based programs" "must rest on evidence at least approaching a *prima facie* case of racial discrimination." That circuit further stated in *Lutheran Church-Missouri Synod v. Federal Communications Commission*, 141 F.3d 344, 354 (D.C. Cir. 1998): "We do not think diversity can be elevated to the 'compelling' level . . . ." That decision held that the federal government does not have a "compelling" interest in broadcast diversity sufficient to support racial classifications for hiring by radio stations. In reaching its decision, the court explicitly noted two concerns echoed by the dissent below and present in this case: that the nonremedial interest in diversity was "too abstract to be meaningful" thus "justifying . . . unconstrained racial preferences" (*id.* at 354-55), and doubts about the constitutionality of "encourag[ing] the notion that minorities have racially based views." *Id.* at 355.

The Third Circuit held in *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), that

> a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a "passive participant . . . ."

The Third Circuit went on to rule that a challenge to "race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a part." *Id.* at 597. Here, as noted by the Ninth Circuit, the race-based preferences were not intended by UES to be remedial. App. A:4 n.3. The Ninth Circuit's approval of such preferences conflicts with the *Philadelphia* case in which the Third Circuit held that unless classifications based on race "are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 91 F.3d at 597 (citing *Croson*, 488 U.S. at 493).

Further, in *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997), the Third Circuit rejected diversity as an appropriate justification for affirmative action programs for public school teachers. The Third Circuit pointed out that the school board conceded that "there is no positive legislative history supporting its goal of promoting racial diversity 'for education's sake.'" *Id.* at 1558. In direct conflict, the Ninth Circuit approved the UES scheme of promoting racial diversity "for education's sake" by finding UES' race quota to be "narrowly tailored to achieve the necessary laboratory environment." App. A:11.

Prior to the Ninth Circuit's ruling, the only contrary authority was the Seventh Circuit's ruling in *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997). That court held that the State of Illinois had a compelling interest in racial preferences in hiring lieutenants to staff prison "boot camps" for young offenders based on evidence that the overwhelmingly "black inmates [would be] unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp." *Id.* at 920. Although recognizing the state's interest was not remedial, the Seventh Circuit explicitly rejected *Hopwood's* contrary conclusion and held that "the rectification of past

discrimination is not the only setting in which government officials can lawfully take race into account in making decisions." *Id.* at 919.

The issue of what constitutes a compelling state interest sufficient to justify race-based classifications has led both the lower courts and commentators to call for this Court's guidance.[5] This split of authority among the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits on an issue of critical public importance warrants this Court's review to secure conformity. Supreme Court Rule 10(a).

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[5] *See, e.g., Wessmann v. Gittens,* 160 F.3d 790, 795 (1st Cir. 1998) ("The question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled."). *McNamara v. City of Chicago,* 138 F.3d 1219, 1222 (7th Cir. 1998) ("Whether other justifications [than the remedial one] are possible is unsettled.").

See also Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis,* 85 Cal. L. Rev. 297, 343 (1997) (noting "[t]he conflict between the Fifth and Seventh Circuits"); Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms,* 16 Yale L. & Pol'y Rev. 59, 59 and n.4, 72 (1997) (noting "[c]onflict [i]n [t]he [c]ircuits" among Third, Fifth, and Seventh Circuits on issue of whether nonremedial interests will be compelling under strict scrutiny); Note, *Racial Classifications Under Strict Scrutiny,* 77 Tex. L. Rev. 259, 271 n.63, 275 (1998); Note, *Transracial Adoption and the Federal Adoption Subsidy,* 17 Yale L. & Pol'y Rev. 201, 239 (1998) ("There is currently a split between the Fifth and Seventh Circuits over the use of racial classifications for nonremedial purposes.").

II

THE NINTH CIRCUIT'S RULING THAT RACE QUOTAS IN SCHOOL ADMISSIONS CAN BE JUSTIFIED BY THE ASSUMPTION OF VALIDITY OF RACIAL STEREOTYPES AS TO "LEARNING STYLES" CONFLICTS WITH THE RULINGS OF THIS COURT AND THE RULINGS OF OTHER CIRCUITS

The Ninth Circuit rationalized UES' race quota by finding that the school needed a particular racial composition to study problems facing urban schools, including a "'list of such issues and challenges [that] includes limited language proficiency, different learning styles,[6] involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children.'" App. A:5. The Ninth Circuit found that the district court correctly concluded that "'the use of racial and ethnic identity criteria in UES's admission policy is *narrowly tailored* to serve the purpose of a compelling state interest.'" App. A:8 (emphasis by the court).

A. The Ninth Circuit's Assumption of the Validity of Racial Stereotypes to Justify the Use of Race Quotas Conflicts with the Rulings of This Court

The purpose of the Fourteenth Amendment Equal Protection Clause is "to prevent the States from purposely discriminating between individuals on the basis of race." *Shaw v. Reno,* 509 U.S. at 642. The Fourteenth Amendment's intent is to ensure that all persons will be treated "as individuals, not 'as simply components of a racial . . . class.'" *Miller v. Johnson,*

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[6] Dr. Deborah Stipek, director of UES, App. A:5, testified that "'[e]thnicity is an important variable in research related to education because there is evidence that children with different ethnic backgrounds often have different learning styles.'" App. A:31 n.18 (Beezer, J., dissenting).

515 U.S. 900, 911 (1995). This Court held in *Miller, id.*: "Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts–their very worth as citizens–according to a criterion barred to the Government by history and the Constitution.'" In utter disregard of this warning, the Ninth Circuit not only permits but approves of the state's admitting UES students so as to evaluate their "thoughts and efforts," or as here rephrased by the Ninth Circuit, their "differ[ing] learning styles," App. A:5, on the basis of their race.

This Court concluded in *Miller, id.* at 927, by quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991): "'If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.'"

Croson, 488 U.S. at 493-94, cited Justice Powell's finding on race preferences in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), in warning against the philosophy behind the UES program.

> "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth."

Croson, 488 U.S. at 494.

Croson, id. at 496, further notes Justice Powell's opinion in *Bakke*, 438 U.S. at 307, "decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake,' forbidden by the Constitution." In like manner, the UES racially segregated admissions plan, based on a desire to have

a greater racial diversity for its own sake is "discrimination for its own sake" and is similarly constitutionally proscribed.

Croson emphasized that proper findings of racial discrimination are necessary to define the scope of the injury and the extent of the remedy. 488 U.S. at 510. The rationale was plainly spelled out:

> Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.

Id.

The Ninth Circuit noted with approval the "'parade of experts [who testified] about the necessity of a race conscious admission policy at UES.'" App. A:8-9. This was "'underscored by the belief that the State must "continue to conduct research on issues involving how children learn."'" App. A:8-9. The underscored assumption of this "parade of experts" is that children of different races are fundamentally different and must be treated differently by the education process.[7]

As Judge Beezer stated in dissent:

> Appellees appear to believe that a child's race and ethnicity is somehow linked to a distinct "learning style," and that these supposed cognitive differences between the races call for study. However, none of

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[7] The Ninth Circuit justified its decision by arguing that "[n]o one would challenge a decision of UCLA medical school to explicitly consider ethnicity in selecting study participants for research on Gauchers disease or Tay-Sachs–diseases that occur predominantly in the Jewish population." App. A:10-11 n.11. But unlike the far more nebulous classification of "learning styles"–which even Respondents do not claim have a physiological basis in race or ethnicity–diseases can have a scientifically verified genetic basis that is directly linked to the subject's race or ethnicity.

> appellees' evidence concretely demonstrates the existence of an ineluctable connection between any particular race/ethnicity and any particular "learning style."

App. A:31 (footnote omitted).

The Ninth Circuit's reliance on UES' "parade of experts" was effectively rebutted by Justice O'Connor's dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547.

> Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.

Id. at 602 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).

Respondents' expressed reliance on the theory of learning styles that vary with the race of the child is exactly the type of racial stereotype that this Court rejected in *Miller* and *Croson*. The Ninth Circuit's upholding of this use of stereotype is in direct violation of this Court's precedents and requires review under Supreme Court Rule 10(c).

B. The Ninth Circuit's Reliance on an Assumption of the Validity of Racial Stereotypes to Justify Race Quotas Conflicts with the Rulings of Other Circuits

In *Wessmann v. Gittens*, 160 F.3d 790, the First Circuit overturned a Boston public school's race-conscious admissions policy. The court found that "if justified in terms of group identity, the Policy suggests that race or ethnic background determines how individuals think or behave." *Id.* at 799. There, as here, the Boston school claimed that a minimum number of persons of a given race or ethnic background was

essential to facilitate the school's policy. *Id.* The First Circuit, found, however:

> This very position concedes that the Policy's racial/ethnic guidelines treat "individuals as the product of their race," a practice that the Court consistently has denounced as impermissible stereotyping. *Miller*, 515 U.S. at 912.

Id. (footnote omitted).

The Third Circuit in *Contractors Association of Eastern Pennsylvania, Inc.*, relied on *Croson* in rejecting the use of racial stereotypes. 91 F.3d at 606. That court found that race-based preferences may be adopted only when there is a strong basis in evidence to conclude that remedial action is necessary. Only such a basis will provide "sufficient assurance that the racial classification is not 'merely the product of unthinking stereotypes or a form of racial politics.'" *Id.* at 610 (quoting *Croson*, 488 U.S. at 510).

The Fourth Circuit found in *Hayes v. North State Law Enforcement Officers Association*, 10 F.3d 207, 216 (4th Cir. 1993): "Classifications based on race carry a very real danger of stigmatic harm; they threaten to stereotype individuals because of their race and incite racial hostility."

In *Tuttle v. Arlington County School Board*, 195 F.3d 698, the Fourth Circuit took special note of

> the burden of the [racial classification] Policy on innocent third parties. The innocent third parties in this case are young kindergarten-age children like the Applicants who do not meet any of the Policy's diversity criteria. We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.

Id. at 707 (footnote omitted). The Fourth Circuit found it "both unfortunate and potentially pernicious that four year old children are directed by the state to identify themselves for admissions purposes as African American, Asian, Caucasian, [or] Hispanic." *Id.* at 707 n.12.

This is precisely the unfortunate and pernicious situation in the present case. Because four-year-old Keeley Tatsuyo Hunter did not meet the state's diversity criteria her admissions application received discriminatory consideration on the basis of her race.

Because the Ninth Circuit's ruling that race quotas can be justified by research based on an assumption of the validity of racial stereotypes conflicts with the decisions of the First, Third, and Fourth Circuits, this Court's review is necessary to secure conformity with those decisions. Supreme Court Rule 10(a).

III

THE NINTH CIRCUIT'S EXPLICITLY DEFERENTIAL REVIEW OF THE NECESSITY AND TAILORING OF RESPONDENTS' RACIAL QUOTAS CONFLICTS WITH THIS COURT'S DECISIONS AND THE DECISIONS OF NUMEROUS COURTS OF APPEALS

A. The Ninth Circuit's Deferential Review of Race-Based Issues Conflicts with This Court's Decisions

The Ninth Circuit expressly stated that in reviewing the necessity and tailoring of Respondents' racial quotas, it "defer[red] to [Respondents'] decisions about what they need for their research." App. A:10. That decision is flatly inconsistent with numerous decisions of this Court. Because deference to the party employing a racial classification is antithetical to strict scrutiny's requirement of "the *most searching* judicial inquiry," *Adarand Constructors, Inc. v.*

Pena, 515 U.S. 200, 236 (1995) (emphasis added), this Court has repeatedly emphasized that deference has no place in such analysis. In *United States v. Virginia*, 518 U.S. 515 (1996), for example, this Court reviewed a Fourth Circuit decision stating that the purpose of a gender-classification statute establishing separate leadership schools for men and women "should be reviewed deferentially." *Id.* at 528. In reversing, this Court held that "deferential review" was "inconsistent with the more exacting standard our precedent requires," *id.* at 555, and concluded that "[t]he Fourth Circuit *plainly erred* in exposing Virginia's . . . plan to such a deferential analysis, for 'all gender-based classifications today' warrant 'heightened scrutiny.'" *Ibid.* (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)) (emphasis added). Because *Virginia* involved intermediate scrutiny for gender classifications, its conclusion would apply *a fortiori* here.

In *Miller v. Johnson*, this Court similarly refused to accept the Justice Department's conclusory factual statements that a particular redistricting plan was necessary to comply with the Voting Rights Act. Quoting *Croson*, the Court wrote that "'[t]he history of racial classifications in this country suggests that blind judicial deference to . . . pronouncements of necessity has no place in equal protection analysis.'" 515 U.S. at 922 (quoting *Croson*, 488 U.S. at 501).

The Ninth Circuit justified its deferential standard of review by citing this Court's statement in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 199 (1990), that "'judges asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.'" App. A:11. Far from supporting the Ninth Circuit's argument, that opinion decisively *refutes* the proposition that racial classifications in the academic context are entitled to deference. That case merely held that universities do not enjoy a special privilege under common law or the First Amendment protecting

peer review materials from disclosure in race- or sex-discrimination lawsuits. The Court's statement about the propriety of deferring to "academic decision[s]" was expressly predicated on the fact that the litigants had not claimed that "race, sex, [or] national origin" was a permissible "academic grounds" for making decisions. 493 U.S. at 199 n.7.

Indeed, the Court cited a passage in Justice Powell's opinion in *Regents of University of California v. Bakke* (*see id.*), which stated that although schools generally have discretion in making admissions decisions, "constitutional limitations protecting individual rights *may not be disregarded*" in making those decisions. 438 U.S. at 312-14 (emphasis added) *cited in* 493 U.S. 199 n.7. Deference to race-based decisions has no place in the academic context; it would be impossible to determine whether "genuinely academic decisions" were in fact "genuine" without the tool of strict scrutiny to "smoke out" impermissible uses of race. *Croson*, 488 U.S. at 493 (plurality opinion).

The Ninth Circuit's deference to Respondents' judgment that racial quotas were necessary for purposes of educational research conflicts with this Court's rulings in *Virginia, Miller*, and *University of Pennsylvania* and requires review to secure conformity with those decisions.

B. The Ninth Circuit's Deference on Race-Based Issues Conflicts with the Decisions of Other Circuits

The decision below also conflicts with numerous Court of Appeals decisions holding that deference is inappropriate under strict scrutiny in the specific context of using racial classifications to determine student body composition. In *Wessmann v. Gittens*, 160 F.3d 790, the First Circuit explicitly rejected the argument that courts should "defer[] to school officials' determinations anent the racial and ethnic composition of the student body," writing that "constitutional

principles cannot take a back seat to the discretion of local school officials in respect to matters such as the racial composition of student bodies." *Id.* at 797 n.3.

In *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996), the Tenth Circuit addressed the constitutionality of a charter school law that reserved a number of schools for "at-risk pupils." The court held that if the "at-risk" classification were shown to be a proxy for race or national origin, deference would be inappropriate because "deference is abandoned" when legislation involves "a 'suspect class' or impinges upon the exercise of a 'fundamental right.'" *Id.* at 488. Similarly, the Sixth Circuit has recently noted, in striking down a race-based set-aside for contractors, that the Constitution "require[s] more" than "deference to the [decisionmaker]" who created the classification. *Associated General Contractors of Ohio, Inc. v. Drabik*, No. 98-4393, 2000 U.S. App. LEXIS 12006, *10 (6th Cir. June 1, 2000); *accord Little Rock School District v. Mauney*, 183 F.3d 816, 828 (8th Cir. 1999) ("Unless a claim involves a suspect classification, courts generally assume the validity of legislation due to the deference accorded to legislative judgment.").

A review of the Ninth Circuit's cavalier analysis in this case demonstrates that its deferential standard is fundamentally inconsistent with the exacting scrutiny employed by this Court and the other Courts of Appeals. In concluding that Respondents' strict racial quotas were "necess[ar]y," App. A:8-9, the Ninth Circuit relied *exclusively* on the conclusory statements of three people, two of them Respondents' employees. One testified that the "rule" of researchers is that "[i]f you're trying to find a sample that has some [particular] distribution of race, you use race as the variable to make that." *Id.* Two others testified in wholly conclusory terms that because of the school's small size, "if [students were] selected without *some* explicit consideration of race/ethnicity," it would be "highly unlikely that such a small group . . . would be

representative" of the desired urban school population. *Id.* at 9 (emphasis added). The Ninth Circuit accepted these conclusory statements at face value, and never inquired whether those statements were based on hard data. *Id.*

In contrast, this Court in *Croson* concluded there was insufficient evidence to justify a city set-aside program for minority subcontractors, rejecting "the highly conclusionary statement" of a city legislator "that there was racial discrimination in the construction industry in this area." 488 U.S. at 500 (internal quotation omitted). The Court stated that when a governmental actor "chooses to employ a suspect classification, it *cannot rest upon a generalized assertion* as to the classification's relevance to its goals." *Ibid.* (emphasis added). The Court then conducted a highly detailed analysis of the available statistical evidence and found it lacking. *Id.* at 501-06.

Similarly, the First Circuit conducted a searching examination of the data underlying the expert testimony of a deputy school superintendent concerning the necessity of racial diversity in school admissions to improve low teacher expectations for minorities. *Wessmann v. Gittens*, 160 F.3d at 806. The court rejected her testimony as "unrelievedly general" because it omitted details about the basis for her opinion and her methodology. The court also rejected the testimony of other school officials supporting the racial classification, noting that it was "anecdotal" (*id.* at 805-06) and not based on "concrete" empirical evidence. *Id.* at 807. The court concluded "we cannot allow generalities emanating from the subjective judgments of local officials to dictate whether a particular percentage of a particular racial or ethnic group is sufficient or insufficient" to advance the state's goals. *Id.* at 800.

The Fourth Circuit likewise refused to defer to the City of Charlotte's evidence that promotion of additional African-Americans to the rank of sergeant was necessary "to increase the effectiveness of the police force through enhanced cooperation and support from the citizens of Charlotte." *Hayes v. North State Law Enforcement Officers Association*, 10 F.3d at 213. The city relied on the opinion of its police chief and three reports prepared in the wake of Detroit rioting that concluded that police recruitment of additional minorities would increase their community support and effectiveness. *Id.* at 214-15. Although noting the police chief's "significant experience in the field of law enforcement," the court found it too "subjective" to support use of a suspect classification. The three studies were likewise rejected because they did not specifically support the city's claim that diversity was needed at all ranks (and "specifically at the rank of sergeant"), and were conducted in a different city years earlier. *Id.* at 214-15. *Accord Associated General Contractors*, 2000 U.S. App. LEXIS, *11-15 (conducting detailed analysis of available statistical evidence and concluding evidentiary record did not show remedial action was necessary); *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997) (legislative finding that "race neutral programs cannot address the[se] . . . problems" was too "conclusory" to support racial classification); *Contractors Association*, 91 F.3d at 601 (refusing to credit "the essentially unexplained opinion" testimony of witnesses that minority business enterprises were underrepresented in local trade associations).

The Ninth Circuit's deferential tailoring analysis conflicts with decisions of this Court and numerous Courts of Appeals. The court never identified the precise racial composition the

school purportedly needed to perform research, *see* App. A:38 (Beezer, J., dissenting), without which meaningful narrow-tailoring analysis is impossible. In fact, Respondents' testimony concerning the needed racial composition did not support the use of rigid numerical quotas. One of Respondents' witnesses testified that they needed "diversity *comparable in rough terms* to [that present in] urban schools," App. A:38 (emphasis in original), suggesting that a variety of student body compositions would be suitable and that strict numerical quotas are unnecessary. Another of their witnesses testified that "*some* explicit consideration of race/ethnicity" was necessary to obtain necessary diversity. App A:9. The Fourth Circuit has held closely comparable testimony to be insufficient to support rigid numerical quotas because they go "much further than '*some* consideration of race.'" *Hayes*, 10 F.3d at 216 (emphasis added).

C. The Ninth Circuit's Rejection of Race-Neutral Alternatives Conflicts with the Decisions of This Court and Numerous Courts of Appeals

In "defer[ence]" to Respondents, the Ninth Circuit rejected out-of-hand the numerous alternatives suggested by Petitioner, App. A:10, which would have taken advantage of naturally occurring diversities instead of using constitutionally suspect means to artificially re-create "urban" diversities in upper-class Westwood. The Ninth Circuit rejected those alternatives because they would do nothing to help obtain diversity at UCLA's facility in Westwood, *id.* (although Respondents have never claimed to have, and could *not* have, a compelling interest in operating a lab school at a *particular location*).

The Ninth Circuit's failure to require Respondents to consider race-neutral alternatives conflicts with decisions of this Court emphasizing the importance of determining "whether

there was 'any consideration of the use of race-neutral means'" *before* resorting to racial classifications. *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 237-38 (quoting *Croson*, 488 U.S. at 507); *Croson*, 488 U.S. at 519 (Kennedy, J., concurring) (strict scrutiny "forbids the use even of narrowly drawn racial classifications except as a last resort"). Pre-implementation consideration of race-neutral means is crucial because it helps reveal whether the classification was adopted as a means to a legitimate end or as an impermissible end in itself. *Engineering Contractors Association*, 122 F.3d at 928; *cf. Virginia*, 518 U.S. at 535-36 (giving no weight to post-enactment justifications for gender classification). Numerous other Courts of Appeals have insisted on a showing that the decisionmaker first considered race-neutral means before adopting a constitutionally suspect one. *Associated General Contractors*, 2000 U.S. App. LEXIS 12006, *19 (set-aside plan not narrowly tailored because legislature did not "g[i]ve any consideration to the use of race-neutral means to increase minority participation"); *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999) ("arriving at an exact fit between harm and remedy requires consideration of whether a race-neutral . . . remedy could be used."); *Engineering Contractors Association*, 122 F.3d at 927-28; *Hayes*, 10 F.3d at 216 (program not narrowly tailored where "City did not appear to have considered the use of any race-neutral means . . . to accomplish its goal").

Because the Ninth Circuit committed "plai[n] err[or]" (*Virginia*, 518 U.S. at 555) in subjecting Respondents' race-based classification to deferential review, summary reversal is warranted.

CONCLUSION

Washington v. Glucksberg, 521 U.S. 702 (1997), reviewed Washington's assisted suicide law. The Court there noted Justice Souter's concern with placing the courts on a "slippery slope" because "'the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.'" *Id.* at 733 n.23. The Court agreed that the case for a slippery slope had been made out, "bearing in mind Justice Cardozo's observation of 'the tendency of a principle to expand itself to the limit of its logic.' The Nature of the Judicial Process 51 (1932)." *Id.*

The first steps of this expansion are already taking place. Judge Beezer's dissent notes that three other University of California campuses (San Diego, Santa Cruz, and Irvine) are discussing plans to build their own research-oriented laboratory schools. App. A:33-34 n.21. The decision below gives these and other schools within the Ninth Circuit's far-flung jurisdiction the green light to enforce race quotas for "research purposes."

The Ninth Circuit's ruling thus places the education establishment and the courts on the slippery slope of rationalizing racial preferences on the basis of research. The Ninth Circuit has thereby created so broad an exception to the principle of Equal Protection that once the downhill slide has started there is no delineated stopping point until the slide bottoms out in race-based preferences in all sectors of society. Under the Ninth Circuit precedent, race preference programs will expand to the limits of their logic, not merely in elementary education but in all areas of public control, constrained only by the rationalization of the government gatekeepers, "noble or not," that the preference is related to research.

The Ninth Circuit's reliance on educational research as a compelling state interest justifying racial classifications in school admissions directly conflicts with the rulings of this Court and the Courts of Appeals of the First, Third, Fourth, Fifth, Sixth, Seventh, Eleventh, and District of Columbia Circuits, requiring this Court's review to secure conformity pursuant to Supreme Court Rule 10(a) and (c). For the reasons set forth herein, Petitioner respectfully request that this Court grant this petition for certiorari.

DATED: July, 2000.

Respectfully submitted,

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APPENDIX

Appendix A:1

Filed 9/9/99

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEELEY TATSUYO HUNTER, a minor, by GINA F. BRANDT, her mother and next friend, *Plaintiff-Appellant*, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, and THEODORE R. MITCHELL, *Defendants-Appellees.*	No. 97-55920 D.C. No. CV-95-3301-KN (JRx) OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted
February 1, 1999--Pasadena, California

Filed September 9, 1999

Before: Harry Pregerson, Robert R. Beezer, and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Pregerson:
Dissent by Judge Beezer

Appendix A:2

OPINION

PREGERSON, Circuit Judge:

I.

This case is about an elementary school operated as a research laboratory by UCLA's Graduate School of Education and Information Studies. The Corinne A. Seeds University Elementary School ("UES"), and its research and training mission is to help the State of California meet the needs of a dramatically changing public school population. To this end, UES identifies issues relevant to the education and social development of children in multicultural, urban communities, conducts research on these issues, and develops innovations in teaching based on this research. UES shares its research results with public school teachers throughout the State of California through seminars, workshops, teacher training programs, and published articles.

Each year, UES's Admissions Committee, under the direction of the Dean of the Graduate School of Education and Information Studies and the Director of UES, determines what characteristics are needed in UES's 460-student population to fulfill its research and training mission. UES considers gender, race/ethnicity, and family income in its admissions process to obtain the desired student population. In selecting students, UES also considers other factors that might affect a child's suitability as a research subject, e.g., dominant language, permanence of residence, and parents' willingness to comply with UES's mandatory involvement requirement. Parents of students applying to UES are informed of UES's consideration of race/ethnicity, gender, and family income in admissions.

Richard Hunter and Gina Brandt's older daughter Cia was admitted into UES through its admissions process. Apparently pleased with Cia's experience at UES, in 1995, the year after Cia graduated, they sought to enroll their younger daughter,

Keeley. Keeley was not selected for admission.[1] When notified that their daughter had not been admitted, Keeley's parents sued the Regents of the University of California ("Regents") under Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000(d), and Dr. Theodore Mitchell, Dean of the Graduate School of Education and Information Studies, under 42 U.S.C. section 1983.[2] The suit challenges the constitutionality of UES's admissions process.

The district court conducted extensive hearings on the school's purpose, its research, and its admission process, and ultimately ruled in its favor. The district court found that (1) California had a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools, and (2) UES's consideration of race/ethnicity in its admissions process was narrowly tailored to further that interest. We affirm.

II.

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has said that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 224 (1995). To meet the strict scrutiny test, the Regents must demonstrate that UES's consideration of

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[1] There is no suggestion that any different admission procedures were employed in the process resulting in Keeley's rejection than in Cia's earlier acceptance.

[2] Keeley was four years old when the suit was initiated. Gina Brandt brought the suit as Keeley's "mother and next friend," and Keeley is represented by her father, Richard Hunter, attorney at law.

race/ethnicity is *narrowly tailored to serve a compelling governmental interest. See id.* at 227.

The district court's conclusion that UES's admissions procedures meet the strict scrutiny test is based on extensive findings of fact which we review for clear error. *See National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1993). After reviewing the entire record, we conclude that Judge Kenyon's findings of fact were not clearly erroneous.

The district court's conclusions regarding the sufficiency of those facts in meeting strict scrutiny is a mixed question of law and fact which we review de novo. *See id.* We conclude, as did the district court, that the facts demonstrate that the defendants have met the strict scrutiny test.

III.

In applying the strict scrutiny test to UES's use of race/ethnicity as a factor in its admissions process, we first consider whether California's interest in the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools is a *compelling state interest.*[3]

"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483,493 (1954). The Supreme Court has recognized "'the public schools as a most vital civic institution for the preservation of a democratic system of government.'" *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State.").

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[3] The parties agree that UES's admission' s process is not part of a remedial program.

The district court heard extensive expert testimony on current problems in public urban education. The challenges posed by California's increasingly diverse population intensify the state's interest in improving urban public schools. Cultural and economic differences in the classroom pose special problems for public school teachers. In his decision, Judge Kenyon noted that defendants presented "an unexhaustive list of such issues and challenges [that] includes limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children." Dr. Mitchell,[4] who testified as an expert witness, stated that "[t]here is no more pressing problem facing California, or indeed the nation, than urban education; for it is in the urban school system that the majority of California's future citizens will be educated (either well or poorly), creating the basic fabric for the society of the future."

UES is dedicated to providing more useful and more accurate information to educators facing these challenges. Dr. Deborah Stipek,[5] director of UES, testified, "[t]he current mission of UES is to do research relevant to . . . urban education and to disseminate that research to promote more

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[4] The district court accepted each of the defendants' witnesses as an expert in their field. Dr. Mitchell received a Ph.D. from Stanford University in 1983. He served as chair to Dartmouth's Department of Education, and Deputy to the President of Stanford University before becoming Dean of UCLA's Graduate School of Education in 1992. He has published numerous scholarly articles on education and school reform.

[5] Dr. Stipek also testified as an expert witness. She received a Ph.D. in developmental psychology from Yale University. She has published numerous articles on early childhood and elementary education. She has been with the Graduate School of Education and Information Studies since 1977.

effective education for children in urban schools." As part of its research mission, UES exchanges information with the State Department of Education as well as other California educational policy groups; trains teachers; develops and tests innovative teaching strategies; and disseminates study results nationwide.

Dr. Mitchell also testified that "[t]he dynamic interplay of . . . research, dissemination, professional development, and the training of an ever-expanding cadre of researchers dedicated to find[ing] the answers to the perplexing problems facing urban schools . . . makes UES a unique and powerful instrument in meeting the State's fundamental obligations to the children of its cities."

Given this record, the district court concluded, and we agree, that "the defendants' interest in operating a research-oriented elementary school is compelling."[6]

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[6] The appellant argues that only an interest in remedying past discrimination can justify UES use of race/ethnicity as one of a number of factors in its admissions process. We disagree. The Supreme Court has never held that only a state's interest in remedial action can meet strict scrutiny. In fact, in *Miller v. Johnson*, 515 U.S. 900 (1995), the Court expressly left open the question whether "compliance with the [Voting Rights] Act, *standing alone*, can provide a compelling interest *independent of any interest in remedying past discrimination*." *Id.* at 921 (emphasis added). The Court in *Shaw v. Hunt* followed *Miller* and left this question open: "In *Miller*, we expressly left open the question whether under the proper circumstances compliance with the Voting Rights Act, on its own, could be a compelling interest. Here once again we do not reach that question . . . ." *Shaw v. Hunt*, 517 U.S. 899, 911 (1996) (internal citation and parenthetical omitted).

In addition, contrary to the dissent's assertion, this court has *not* "held that '[r]ace based classifications must be reserved strictly for remedial settings.'" *Infra* at 11085 (quoting *Coral Construction v.*

(continued...)

The dissent expresses some concern that, as a result of our decision, "every stratum of a state's public education system (whether formally designated a 'laboratory school' or not) may now in the name of 'research on effective educational strategies' implement a racially classified admission system." *Infra* at [27-28]. We do not share this concern.

It is not UES's *designation* as a laboratory school that justifies its admission process. UES's status as a laboratory school with a research mission is not a designation without substance. UES's research is funded in part through federal and private grants and its students are protected by all federal, state, and university guidelines, rules, and policies pertaining to research involving human subjects. Research results are shared through "a variety of publications, the television and film industries, computer technologies, and other media," as well as through "seminars, workshops, observation opportunities, and conferences" offered to teachers, administrators, researchers, and educational policy makers. Its research mission and its dissemination of information makes UES "a center for the education and training of teachers and educational leaders." Through UES, "nationally recognized scholars work together

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[6] (...continued)
King County, 941 F.2d 910, 920 (1991)). Rather, this court held that where the asserted state interest is remedying past discrimination, this remedial interest must be supported by concrete evidence of discrimination. *See id; see also Monterey Mechanical v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997) (same). In *Coral* and *Monterey*, this court simply followed the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which required a "strong basis in evidence" for race-based remedial action. These holdings have no bearing on the question whether a non-remedial interest, such as the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools, can serve as a compelling interest sufficient to survive strict scrutiny.

with educators and administrators to foster a better schooling system for California children."

Nor does UES's *stated mission* of "educational research" justify its admissions process. A mere statement from a governmental entity that it is committed to research, without more, would not be sufficient to establish a compelling interest. But research is fundamental to the UES's charter. The research mission affects the day-to-day experience of its students and requires more resources than those available to most, if not all, other elementary schools. In 1995, UES's elementary school, with its population of 460 students, had a faculty of twenty-seven professors with doctorates in fields including psychology, education, and medicine. In addition, twenty-one graduate, doctoral, and post-doctoral students, three medical students, thirty-two nursing students, and seventy-five undergraduate student teachers were involved with the elementary school, observing, working with students, and conducting research.

All of these characteristics make UES an exceptional school and a valuable resource to California's public education system. Consequently, we do not share the dissent's concerns that this decision will lead to racial classification in "every stratum of a state' s public education system." *Infra* at [27].

IV.

To complete our strict scrutiny analysis, we next address the question whether the district court correctly concluded that "[t]he defendants have successfully proven that the use of racial and ethnic identity criteria in UES's admission policy is *narrowly tailored* to serve the purpose of a compelling state interest." (Emphasis added.) In support of this conclusion, the district court pointed to "a parade of experts [who testified] about the necessity of a race-conscious admission policy at UES. Each expert' s testimony was underscored by the belief that the State must 'continue to conduct research on issues

involving how children learn and how we can do a better job of teaching them.'" (quoting Dr. Harry Handler's[7] testimony).

Dr. Carollee Howes[8] testified that "[t]here is a simple rule about being a researcher . . . . If you're trying to find a sample that has some [particular] distribution of race, you use race as the variable to make that. You don't use an approximation or some variable of it." Dr. Stipek further testified that "even if the applicant pool in the aggregate [was] sufficiently diverse, an entirely random selection would not yield a population that balances ethnicity with other factors, such as age, gender and family income." Dr. Handier also testified that "[b]ecause of the small sample size, it is highly unlikely that such a small group, if selected without some explicit consideration of race/ethnicity, would be representative of Los Angeles' or the State's urban school population."[9]

The district court commented on the testimony presented:

> The Court simply cannot hope to recount each of the particular innovative educational techniques developed at UES, or each of the specific studies

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[7] Dr. Harry Handler has a Ph.D. in Educational Psychology from the University of Southern California, and, at the time of his testimony, was Adjunct Professor and Special Assistant to the Graduate School of Education and Information Studies. Dr. Handler was Superintendent of the Los Angeles Unified School District for seven years.

[8] Dr. Howes has a master's degree in child study from Tufts University, a Ph.D. in developmental psychology from Boston University, and post-doctoral training in social psychiatry at Harvard University. Dr. Howes has published books, treatises and studies in her field including a series on child care policy studies.

[9] In 1995, there were 46 students admitted to the Early Childhood Program. Consequently, each child made up 2.2% of the class.

> conducted at UES, which rely on the diversity of the laboratory school's student population. Having examined the testimony of the defendants' witnesses, the Court is convinced that without a racially and ethnically diverse student population, the benefits to be gained by these innovations and studies would be lost.

Accordingly, the district court concluded that "it would not be possible, nor would it be reasonable, to require the defendants to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications."

The dissent suggests a number of alternatives to UES' s current admissions process. These alternatives range from locating laboratory schools elsewhere to mandating laboratory conditions in public schools throughout California. *See infra* at 11098. But both Dr. Stipek and Dr. Handler testified that it was necessary to explicitly consider race/ethnicity in UES's admissions process to achieve the. precise student population required for UES's research.[10] Therefore, even if California were to establish one or more other lab schools elsewhere, this would not address *UES*'s need to maintain the representative sample of students UES needs to fulfill its research mission.

Finally, in evaluating whether UES's use of race/ethnicity in its admissions process is narrowly tailored, we recognize, as did the district court, that courts should defer to researchers' decisions about what they need for their research.[11] The

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[10] We cannot have a subject sample that does not have meaningful distribution of ethnicity and still meets the scientific standards that we are held to . . . . Otherwise, you can't do research there." Dr. Stipek's Trial Testimony for April 9, 1997.

[11] No one would challenge a decision of UCLA medical school to

(continued...)

Supreme Court has stated: "Courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.'" *University of Penn v. EEOC*, 493 U.S. 182, 199 (1990) (internal quotation marks and citation omitted).

Based on the evidence in the record, we agree with the district court's determination that UES's use of race/ethnicity in its admissions process is narrowly tailored to achieve the necessary laboratory environment.

V.

In short, UES is a research-oriented institution dedicated to developing effective techniques for use in urban public schools—a project that benefits public school children throughout the state. California has a compelling interest in providing effective education to its diverse, multi-ethnic, public school population. UES's use of race/ethnicity in its admissions process is narrowly tailored to achieve the necessary laboratory environment to produce research results which can be used to

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[11] (...continued)
explicitly consider ethnicity in selecting study participants for research on Gauchers disease or Tay-Sachs—diseases that occur predominantly in the Jewish population. Nor would anyone have a problem with a study on the effects of nutrition in the prevention of sickle-cell anemia that limited study participants to Black children. Nor would anyone object to a similar study of pernicious anemia that limited participants to older persons of Northern European descent. The National Institute for Health is currently calling for grant applications for research investigating why prostate cancer occurs with greater frequency in white and black men than in Hispanic and Asian men.

improve the education of California's ethnically diverse urban public school population.

AFFIRMED.

BEEZER, Circuit Judge, Dissenting:

Keeley Tatsuyo Hunter appeals the district court's determination that the use of a racially classified admissions procedure at the Corrine A. Seeds University Elementary School ("UES") does not violate the Equal Protection Clause of the Fourteenth Amendment.

I write separately to express my fundamental disagreement with the court's opinion. It contravenes the central purpose of the Equal Protection Clause: to purge racial classifications from public life. The opinion strays from our precedent and fails to take heed of the Supreme Court's repeated warnings against allowing the use of racial classifications in non-remedial contexts. More generally, the opinion reflects a disquieting renewed tolerance for the use of race in governmental decisionmaking.

I

UES is a laboratory elementary school operated by the Graduate School of Education and Information Studies ("GSE&IS") at the University of California, Los Angeles ("UCLA"). Students at UES are research subjects.[1] UES's stated mission is to conduct research relevant to an urban educational experience, to work with teachers, communities and schools to disseminate that research and to foster a more effective education system primarily for urban elementary students. More specifically, as described in appellees' brief, UES is devoted to "[s]tudying how children learn and how their backgrounds and family experiences—including their racial and

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[1] Appellees characterize UES as "a controlled laboratory for educational researchers, akin to the laboratories used by physical scientists."

ethnic identities—impact on their educational experience." UES has a student population of approximately 460 children, ages 4 to 12, who attend pre-kindergarten through sixth grade classes.

The UES admissions committee is comprised of three UES teachers and two GSE&IS faculty members. In selecting students for each year's incoming class, the UES admissions committee does not use pre-selection interviews, achievement/ability testing or any other type of competitive criteria. However, the UES admissions committee explicitly considers, inter alia, every applicant's racial/ethnic identity.[2] It does so in an attempt to obtain what it considers an adequate cross-sample of the general student population, thus maintaining the scientific credibility of its educational studies.[3]

In December 1994 Hunter, who is now eight years old, applied for admission into UES's 1995-1996 entering class for four-year-olds (the so-called Early Childhood, or "EC-1," Program). Six racial/ethnic categories were used for the 1995-1996 admissions cycle: African-American, Asian-American, Native American, Latino(a), Caucasian and Multi-Ethnic. In the section of the admissions application entitled "Child's Ethnic Identity," Hunter identified herself as "Asian-American (specify): Japanese" and "Caucasian."[4]

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[2] An information brochure prepared by UES states: "As a school that is seeking and disseminating ways to improve the children's learning and social development, Seeds UES must have a population of children that is relevant to the student population in California. To achieve this, [GSE&IS] sets gender, ethnicity and family income population goals for the school."

[3] A representative cross-sample is necessary, according to appellees, because "findings cannot be generalized beyond the population on which the research was conducted."

[4] Hunter is one-quarter Japanese and three-quarters Caucasian.

Hunter was one of 215 applicants for admission to UES's EC-I program, 46 of whom were admitted. On March 11, 1995, Hunter was notified that she had been denied admission.

The UES admissions procedure for the 1995-1996 school year operated as follows:

First, the 20 siblings of current UES students who applied for admission were identified and admitted;

Second, the UES admissions committee determined a specific number of each racial/ethnic group to be admitted;

Third, dominant Spanish-speaking applicants were identified and a number of them were admitted;

Fourth, applicants from each self-identified racial/ethnic group were chosen at random to create a shorter list of potential admits;

Fifth, from the children randomly selected within each racial/ethnic category, further sorting was done to ensure a reasonable gender balance and to distribute the admitted children among income groups;

Finally, a number of children were specially selected by the Dean of the GSE&IS (so-called "Dean's Admits") and substituted for randomly-selected children of the same gender, racial/ethnic identity and income group.[5]

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[5] The demographic racial breakdown, as self-reported, of the 215 children who applied for admission to UES's EC-1 program was as follows: 110 Caucasians (51.2%); 49 mixed-race (22.8%); 23 African-Americans (10.7%); 19 Asians (8.8%); and 14 Latinos (6.5%). The demographic racial breakdown, as self-reported, of the 46 admitted applicants was as follows: 18 Caucasians (39.1%); 8 mixed race (17.4%); 6 African- Americans (13%); 4 Asians (8.7%); and 10 Latinos (21.7%).

Hunter brought suit on May 17, 1995 against the Regents of the University of California ("Regents") under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), and against Theodore R. Mitchell, Dean of the GSE&IS and Vice Chancellor of Academic Planning and Budget at UCLA, under 42 U.S.C. § 1983. Hunter claimed that UES's utilization of racial quotas in denying her admission to UES's 1995-1996 EC-1 entering class violated the Equal Protection Clause of the Fourteenth Amendment. Following a two-day bench trial, the district court held that appellees' use of a racially classified admissions procedure is constitutional. In particular, the district court held that the use of racial and ethnic identity criteria in UES's admission policy is narrowly tailored to serve a compelling governmental interest. This timely appeal followed.

II

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. It is grounded on the principle that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *see also Shaw v. Reno*, 509 U.S. 630, 643 (1993) ("*Shaw I*") (racial distinctions "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility"). The central purpose of the Equal Protection Clause is "to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw I*, 509 U.S. at 642. It is meant to ensure that all persons will be treated "as individuals, not simply as components of a racial . . . class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks omitted). "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the

Constitution's guarantee of equal protection." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995).

"[R]egardless of [the] purported motivation," *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997), "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[6] *Adarand*, 515 U.S. at 227; *see Coalition for Economic Equity*, 122 F.3d at 702 ("[a]ny governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny"). "[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. It is the government's burden to satisfy the demands of this "extraordinary justification," *Coalition for Economic Equity*, 122 F.3d at 702. *See Adarand*, 515 U.S. at 224 ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

III

It is uncontroverted that the racially classified admissions procedure at UES treats individuals unequally. *Cf. Coalition For Economic Equality v. Wilson*, 122 F.3d 692, 707 (9th Cir. 1997). The only issues on appeal are whether appellees have asserted a sufficiently compelling interest to do so, and whether their chosen means are narrowly tailored to serve that interest.

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[6] Although appellants bring suit under Title VI, a racial classification is permissible under Title VI only where it satisfies the strict scrutiny standard applied under the Equal Protection Clause. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J.); *id.* at 328 (Brennan, White, Marshall, and Blackmum JJ.).

A

Appellees assert two separate, but related, compelling governmental interests: (1) California's "interest in research on effective urban educational strategies and dissemination of new knowledge about educational practices"[7] and (2) California's "interest in promoting freedom of inquiry at the University of California." Appellees' Brief at 18, 41. Neither interest, whether considered singly or together, is sufficiently compelling to withstand strict scrutiny.

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As the First Circuit recently noted in *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998), "[t]he question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled." A few things, however, are certain. "A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("*Shaw II*"). For that interest to constitute a compelling governmental interest, it must satisfy two conditions. First, the discrimination must be specific, identified discrimination. *See id.* Second, "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary . . . ." *Id.* at 910.

It is also certain that "a generalized assertion of past discrimination in a particular industry or region is not adequate" to justify a race-conscious remedial scheme. *See Shaw II*, 517 U.S. at 909. Such a broadbrush justification "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* (internal quotation marks

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[7] Throughout this opinion, I will refer to this asserted interest with the shorthand "educational research."

omitted). For like reasons, the "role model" theory[8] is unacceptable as a compelling governmental interest. Not only does such a theory lack any connection to "the kind of prior discrimination . . . that would justify race-based relief," but also it "could be used to justify race-based decisionmaking essentially limitless in scope and duration." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497-98 (1989) (plurality opinion) (internal quotation marks omitted). Unlike a race-based remedy that is specifically tied to the eradication of identified past discrimination, the role model theory "has no logical stopping point." *Wygant*, 476 U.S. at 275 (plurality opinion). It would allow the government "to engage in discriminatory . . . practices long past the point required by any legitimate remedial purpose." *Id.*

Beyond those few certainties, the caselaw is more opaque.[9] In *Croson*, a plurality of the Supreme Court held that racial classifications are justified only when used to remedy the effects of racial discrimination. *See Croson*, 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). One year later, four

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[8] First seen in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274 (1986), this theory holds that minority students are in need of "role models" to alleviate the effects' of prior societal discrimination.

[9] As Judge Wiener, concurring in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), observed, "the Supreme Court [has] declined to define compelling interest or to tell us how to apply that term." *Id.* at 965 n.19 (Wiener, J., concurring); *see also* Susan M. Maxwell, Note, Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach, 77 Tex. L. Rev. 259, 296 (1998) ("the Court's view on the constitutionality of nonremedial racial classifications remains ambiguous").

members of the current Supreme Court reiterated this view: "We subject even racial classifications claimed to be remedial to strict scrutiny . . . to ensure that the Government in fact employs any race-conscious measures to further this remedial interest [in redressing the effects of identified race discrimination] and employs them only when, and no more broadly than, the interest demands." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 611 (1990) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) (citing *Croson*, 488 U.S. at 493-95, 498-502 and *Wygant*, 476 U.S. 267 (plurality opinion)).

Six of our sister circuits have adopted this view and have definitively held that racial classifications may only be used for the purpose of remedying racial discrimination. *See Hopwood v. State of Texas*, 78 F.3d 932, 944 (5th Cir. 1996); *Contractors Ass'n v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996); *Aiken v. City of Memphis*, 37 F.3d 1155, 1162-63 (6th Cir. 1994); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1544 (11th Cir. 1994); *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992); *Podberesky v. Kirwan*, 956 F.2d 52, 56 (4th Cir. 1992). *But see Wittruer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (holding that effective operation of prison boot camps is compelling governmental interest). We have also clearly held that "[r]ace-based classifications must be reserved strictly for remedial settings." *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991) (citing *Croson*, 488 U.S. at 493, 524); *see also Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997). *But cf. Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997) ("The Equal Protection Clause . . . prohibits [racial classifications] in all but the most compelling circumstances. [Racial classifications are] in most circumstances irrelevant and therefore prohibited [and] should be subject to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.").

A majority of the Supreme Court has never accepted a non-remedial justification for a racial classification.[10] *See Metro*, 497 U.S. at 612 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) ("Modern equal protection doctrine has recognized only one [compelling governmental] interest [in using racial classifications]: remedying the effects of racial discrimination."). In fact, four members of the Court, dissenting in *Metro*, squarely rejected a non-remedial compelling governmental interest in "diversity of broadcast viewpoints."[11] *See id.* Two circuit courts have also specifically rejected the "diversity" justification. *See Hopwood*, 78 F.3d at 948 ("the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny"); *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (noting, in the employment context, that "[w]e do not think diversity can be elevated to the 'compelling' level, particularly when the Court has given every indication of wanting to cut back *Metro Broadcasting*"). Based on its review of the relevant Supreme Court caselaw, the *Hopwood* court even went so far as to state that "non-remedial state interests will never justify racial classifications." *Hopwood*, 78 F.3d at 944.

Justice O'Connor's dissenting opinion in *Metro* represented the view of four Justices. The majority opinion in

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[10] Justice Scalia has, however, offered one: "a social emergency rising to the level of imminent danger to life and limb--for example, a prison race riot, requiring temporary segregation of inmates." *Croson*, 488 U.S. at 521 (Scalia, J., concurring).

[11] "It bears noting that Justice Powell's oft-cited opinion in *Bakke*, which approved the consideration of race as "one element in a range of factors a university may properly consider" in achieving diversity among its student body, *Bakke*, 438 U.S. at 314, "garnered only his own vote and has never represented the view of a majority of the Court," *Hopwood*, 78 F.3d at 944.

Metro upheld the federal government's non-remedial interest in "diversity of broadcast viewpoints" only by applying intermediate scrutiny (which the Court believed appropriate for federal racial classifications). *Metro* has since been overruled, *see Adarand*, 515 U.S. at 225-27, in part because its application of intermediate scrutiny to federal racial classifications was inconsistent with the strict scrutiny applied to state racial classifications. In overruling *Metro*, *Adarand* did not specifically address the question whether "diversity of broadcast viewpoints" could count as a compelling governmental interest under strict scrutiny. *See id.* at 258-59 (Stevens, J., dissenting) ("the question is not remotely presented in this case"). Thus, the *Metro* dissent's thorough and thoughtful rejection of an asserted non-remedial governmental interest in "diversity" under strict scrutiny provides significant guidance on the question whether UES's asserted interests in educational research and academic freedom constitute compelling governmental interests.[12]

The leitmotif of Justice O'Connor's dissent in *Metro* is best captured by the following: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro*, 497 U.S. at 602 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting). Racial classifications, "whether providing benefits to or burdening particular racial or ethnic groups," are inherently pernicious because "[t]hey endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus

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[12] Like UES in the case at bar, the FCC in *Metro* "concede[d] that its policies embodied no remedial purpose." *Metro*, 497 U.S. at 611 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).

contributing to an escalation of racial hostility and conflict." *Id.* at 603-04. Such policies "may stigmatize those groups singled out for different treatment" and "may embody stereotypes that treat individuals as the product of their race . . . ." *Id.* at 604.

The majority in *Metro* found solace in their argument that "diversity" would only justify "benign" uses of race-conscious measures. *See Metro*, 497 U.S. at 563-65 & n.12. The dissenters found this cold comfort, noting that "[t]he Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility." *Id.* at 609 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting). "Divorced from any remedial purpose and otherwise undefined, 'benign' means only what shifting fashions and changing politics deem acceptable." *Id.* at 615. Thus, "racial distinctions might be directed expressly or in practice at any racial or ethnic group" depending on "the preference of the moment." *Id.* at 610.

It is precisely because racial classifications are "potentially so harmful to the entire body politic," *id.* at 604 (internal quotation marks omitted), that the Supreme Court has only tolerated them in carefully defined remedial contexts. *See id.* at 612; *Wygant*, 476 U.S. at 275 (plurality opinion) (noting "the Court' s focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies"). A non-remedial "interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Metro*, 497 U.S. at 612 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).

Justice O'Connor's dissenting opinion excoriated the majority for "too casually extend[ing] the justifications that might support racial classifications, beyond that of remedying past discrimination." *Id.* at 613. Justice O'Connor's opinion

characterized "diversity" as "certainly insufficiently weighty to justify tolerance" of government-sponsored racial distinctions; indeed, to accept "diversity" as a justification would be to "trivialize[] the constitutional command to guard against such discrimination." *Id.* Of particular concern was the possibility that, "[l]ike the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify . . . unconstrained racial preferences . . . [and] would support indefinite use of racial classifications." *Id.* at 614. Justice O'Connor's discussion of "diversity" as a possible compelling governmental interest concluded with a stern admonition:

> We should not accept as adequate for equal protection purposes an interest unrelated to race, yet capable of supporting measures so difficult to distinguish from proscribed discrimination. The remedial interest may support race classifications because that interest is necessarily related to past racial discrimination; yet the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.

Id. at 615.

The same fear expressed in Justice O'Connor's opinion that "diversity" could be used to justify the indefinite use of racial classifications explains the Supreme Court's requirement that even remedial race- conscious measures be supported by a "specific and verifiable," *id.* at 613, interest in eradicating racial discrimination. *See Shaw II*, 517 U.S. at 909. The Court requires such showings to ensure that racial classifications will have "only limited and carefully defined uses." *Metro*, 497 U.S. at 613 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting). For example, discussing Justice Powell's opinion in Bakke, the Court in Croson high-lighted the

contrast between the "focused" goal of remedying "specific instances of racial discrimination" and the comparatively "amorphous concept of injury" inherent in "societal. discrimination" that "may be ageless in its reach into the past." *Croson*, 488 U.S. at 496-97 (plurality opinion) (internal quotation marks omitted). The idea of "societal discrimination" "does little to define the scope of any injury . . . [and] could justify a preference of any size or duration." *Id.* at 505. Likewise in *Wygant*, the Court rejected the asserted interest in providing minority role models to redress societal discrimination because such a rationale would allow remedies "timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion).

To prevent such an unbridled use of racial classifications, the Court has imposed rigorous evidentiary safeguards: any governmental entity endeavoring to classify by race must point to specific, identified instances of past or present discrimination, *Shaw II*, 517 U.S. at 909, for which that governmental entity has been either actively or passively responsible, *Croson*, 488 U.S. at 482-84, 490-91; and that governmental entity must come forward with "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277 (plurality opinion); *Bakke*, 438 U.S. at 308-09 (Powell, J.) ("findings of constitutional or statutory violations" necessary to justify a racial classification).

Proper findings in this regard are necessary to define both. the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. *Croson*, 488 U.S. at 510 (plurality opinion).

I recognize that the great majority of equal protection jurisprudence has been formulated in the context of challenges to affirmative action programs of one stripe or another. The case at bar is not an affirmative action program; indeed, as appellees put it, the admissions procedures at UES "are not remedial in purpose and are not intended either to enhance the educational opportunities of disadvantaged children admitted to UES or to improve the general educational experience at UES by promoting classroom diversity." Students are selected in fixed numbers according to race or ethnicity only to serve as subjects for educational research.

Let us not forget, however, the fundamental purpose of the Equal Protection Clause of the Fourteenth Amendment: "to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw I*, 509 U.S. at 642. In the face of such a powerful constitutional proscription, UES's novel justifications quickly wither. So "noxious," *Adarand*, 515 U.S. at 241 (Thomas, J., concurring), so "odious," *Hirabayashi*, 320 U.S. at 100, are racial classifications in our constitutional democracy, that four members of the current Supreme Court have held that they have absolutely no place except in the most narrowly defined remedial settings. *See Croson*, 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 524 (Scalia, J., concurring). Another member of the Court, Justice Thomas, has written that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.[13] *Adarand*, 515 U.S. at 241 (Thomas, J.,

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[13] Justice Thomas intolerance for racial classifications would presumably only yield in a situation where such classifications are

(continued...)

concurring). I find these opinions instructive, if not controlling.[14]

Even if UES's asserted interests are examined as possible compelling governmental interests, it is evident that they suffer from the same defects that doomed the "role model" theory in *Wygant*, the "societal discrimination" justification in *Croson* and the "diversity" rationale in *Metro*. As a preliminary matter, I would emphasize that academic freedom, standing alone, is clearly too flimsy an interest to justify racial discrimination. *See Bakke*, 438 U.S. at 313-14 (Powell, J.) (although academic freedom constitutes a "countervailing constitutional interest, . . . constitutional limitations protecting individual rights may not be disregarded"). If "academic freedom" could justify a racial classification, *Plessy v. Ferguson*, 163 U.S. 537 (1896), would still be the law of the land. Thus, "academic freedom" will be considered only as an interest that might buttress UES's alternative claimed interest in educational research.

The district court held that "the defendants' interest in operating a research-oriented elementary school is compelling." I cannot agree. The "Supreme Court's decisions in *Croson* and *Adarand* indicate quite plainly that a majority of the Justices are highly skeptical of racial preferences and believe that the Constitution imposes a heavy burden of justification on their use." *Wessmann*, 160 F.3d at 808. UES's asserted interest in "research on effective urban educational strategies and

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[13] (...continued)
unavoidably "necessary to eliminate [a State' s] own maintenance of a system of unlawful racial classification," *Croson*, 488 U.S. at 526 (Scalia, J., concurring).

[14] As noted above, seven circuit courts of appeal (including this circuit) have agreed that only the remediation of identified past discrimination can justify government-sponsored racial classifications.

dissemination of new knowledge about educational practices," Appellees' Brief at 18, 41, cannot bear that burden.

Just like the "role model" theory in *Wygant*, an "educational research" rationale is "amorphous" and admits of "no logical stopping point." *Wygant*, 476 U.S. at 275-76 (plurality opinion). Just like "the vague assertion of societal discrimination [in *Croson*, or the] claim of insufficiently diverse broadcasting viewpoints [in *Metro*]," *Metro*, 497 U.S. at 614 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting), a governmental interest in educational research "might be used to justify . . . unconstrained racial preferences," *id.*, that are "timeless in their ability to affect the future," *Wygant*, 476 U.S. at 276 (plurality opinion). Its inherent "indefiniteness," *id.*, could easily "justify race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498 (plurality opinion) (internal quotation marks omitted).

Because an "educational research" justification contains "no viable limiting principle," it "may be expanded beyond any reasonable limits." *Hopwood*, 78 F.3d at 950-51. Although this case arises in the unique setting of California's only publicly supported elementary laboratory school, one shudders at the uses to which an "educational research" justification might be put. The holding articulated in the opinion filed today provides no principled basis for limiting the use of racial classifications in the service of "educational research," nor even for restricting the type of state actors who may conduct such research. Every stratum of a state's public education system (whether formally designated a "laboratory school" or not) may now, in the name of "research on effective educational strategies,"[15] implement

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[15] I deliberately omit the word "urban" from the articulation of UES's interest, as nothing in today's holding would prevent research into

(continued...)

a racially classified admissions system. The sure result would be "a mosaic of shifting preferences based on inherently unmeasurable claims.[16] *Croson*, 488 U.S. at 506.

For example, the University of Califomia at Davis Medical School might decide that its school would provide a valuable "research laboratory" site to examine whether a class made up of fixed percentages of members of various races and ethnicities would result in improved educational outcomes for those members. A local school board may determine that all of the elementary and secondary schools within its jurisdiction are

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[15] (...continued)
effective strategies for the education of any particular racial mix of children found in any particular geographical setting.

[16] The Court in *Croson* expressed an unwillingness to accept a justification that lacked a specific link to identified discrimination because that "would be to open the door to competing claims for 'remedial relief for every disadvantaged group . . . . Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential. classifications. We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." *Croson*, 488 U.S. at 505-06 (internal quotation marks and citation omitted). Likewise under the holding in the opinion filed today. Courts will now be thrust into the unseemly position of having to determine which "research" projects are sufficiently genuine and worthy to justify the use of racial classifications. A look back at our history belies this court's apparent faith in the judiciary's capacity to "distinguish good from harmful governmental uses of racial criteria." *Metro*, 497 U.S. at 609 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting); *see also Wittruer*, 87 F.3d at 919 ("common sense undergirded the pernicious discrimination against blacks now universally regretted"); *cf. Korematsu v. United States*, 323 U.S. 214 (1944); *Plessy*, 163 U.S. 537.

now to be educational "laboratories" and that racial quotas in admissions will be utilized in order to guarantee the "research relevance" of its student population. The court's opinion betrays a disturbing tolerance for racial classifications, and a historically unjustified confidence in the ability of government to employ them for "benign" purposes. *See Plessy*, 163 U.S. 537; *see* generally *Fullilove v. Klutznick*, 448 U.S. 448, 486-87 (1980) (Burger, C.J.) (plurality) ("The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications.").

Appellees proferred governmental interest in educational research, even when considered along with its claimed interest in academic freedom, is "certainly insufficiently weighty," *Metro*, 497 U.S. at 613 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting), to justify a departure from the constitutional mandate of equal protection. It is "amorphous" and "indefinite[]" and, consequently, "overexpansive." *Wygant*, 476 U.S. at 275-76 (plurality opinion). It also lacks any connection to the kind of past or present racial discrimination that might, under appropriate circumstances, justify a government's use of racial distinctions. *See Shaw II*, 517 U.S. at 909; *Monterey Mechanical*, 125 F.3d at 714; *cf. Metro*, 497 U.S. at 613 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) (accepting non-remedial interest in "diversity" would "too casually extend[] the justifications that might support racial classifications, beyond that of remedying past discrimination"). I would reverse the district court's holding that appellees claimed "interest in operating a research-oriented elementary school is compelling," *Hunter v. Regents of the Univ. of Calif.*, 971 F. Supp. 1316, 1324 (C.D. Cal. 1997).

IV

"Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280 (plurality opinion). This narrow tailoring requirement demands "the most exact connection between justification and classification." *Adarand*, 515 U.S. at 229 (internal quotation marks omitted). In part, this serves to ensure "that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. 493 (plurality opinion).

We look to a number of factors to gauge whether a racial classification is narrowly tailored: "whether them was any consideration of the use of race-neutral means," *Adarand*, 515 U.S. at 237-38, and the "efficacy of [those] alternative[s]," *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); whether the racial classification was adopted for the sake of "administrative convenience," *Croson*, 488 U.S. at 508; and whether the chosen means are underinclusive or overinclusive, *Metro*, 497 U.S. at 621 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).[17]

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[17] Another important consideration of narrow tailoring, noted in *Adarand* in the context of a challenge to a remedial race-conscious program, is "whether the program [is] appropriately limited" in scope and duration "such that it will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 238 (internal quotation marks omitted). In this case, because appellees asserted interest in educational research is vague and amorphous, UES's admissions procedure, a fortiori, cannot be "appropriately limited" in scope and duration. *Cf. Croson*, 488 U.S. at 507 ("it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified

(continued...)

UES's racially classified admissions procedure is not narrowly tailored.

A

UES's race-based admissions policy lacks the "exact connection 'between justification and classification," *Adarand*, 515 U.S. at 229 (internal quotation marks omitted), that narrow tailoring requires. Appellees appear to believe that a child's race and ethnicity is somehow linked to a distinct "learning style,"[18] and that these supposed cognitive differences between the races call for study. However, none of appellees' evidence concretely demonstrates the existence of an ineluctable connection between any particular race/ethnicity and any particular "learning style."[19] *Cf. Wessmann*, 160 F.3d at 799

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[17] (...continued)
discrimination in any way").

[18] According to Professor Stipek, one of appellees' expert witnesses at trial, "[e]thnicity is an important variable in research related to education because there is evidence that children with different ethnic backgrounds often have different learning styles, respond differently to the same instructional approaches and have different styles of interaction with the teacher."

[19] The district court did not make a specific finding on this discrete question. The closest it came was to make the undifferentiated statement that an ethnically diverse student population presents "issues and challenges [that] include[] limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values and racial and ethnic conflict among families and children." *Hunter*, 971 F. Supp. at 1328-29. To the extent that this statement could be construed as containing a finding of fact that any particular race/ ethnicity is inextricably linked to any particular "learning style," such a finding is, on this record, clearly erroneous. More broadly, the "premise that differences in race

(continued...)

("The School Committee has provided absolutely no competent evidence that the proportional representation promoted by the Policy is in any way tied to the vigorous exchange of ideas . . . "). At best, record evidence shows only a possible connection. For example, Professor Deborah Stipek testified that "children with different ethnic backgrounds *often* have different learning styles." (emphasis supplied). Professor Geoffrey Saxe testified that "ethnic diversity of targeted populations is particularly important for studies involving intervention and assessment, where we can *expect* that there *may* be important differences in the way children make sense of interventions, assessment procedures, and in the nature of mathematics individuals use in their everyday practices." (emphasis supplied).

But strict scrutiny "requires a direct rather than approximate fit of means to ends." *Metro*, 497 U.S. at 620 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting). For example, the four dissenting Justices in *Metro* heard, and condemned, the argument that an individual's "race will likely indicate that [that individual] possesses a distinct perspective."[20] *Id.* at 619. They warned that "even if the . . . equation of race and . . . viewpoint has some empirical basis, equal protection principles prohibit the Government from relying upon that basis to employ racial classifications." *Id.* at 620 (emphasis supplied); *cf. Los Angeles*

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[19] (...continued)
. . . reflect real differences . . . is utterly irrational and repugnant to the principles of a free and democratic society." *Metro*, 497 U.S. at 618 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) (internal quotation marks omitted).

[20] It bears emphasis that, although the majority opinion in *Metro* accepted the approximate fit of means (the FCC's race-based preferential licensing policy) to ends (diversity of broadcast viewpoints), it did so only through the use of intermediate scrutiny. Strict scrutiny may well have led to a different majority opinion.

Dept. of Water and Power v. Manhart, 435 U.S. 702, 709 (1978) ("Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.").

The dissenting opinion in *Metro* applies with full force in the instant case. Even if "some empirical basis" might support the existence of a causal relationship between race/ethnicity and a distinct "learning style," the Equal Protection Clause forbids relying on that basis to classify by race. "[E]ssential equal protection principles . . . prohibit racial generalizations." *Id.* at 619; *see Shaw I*, 509 U.S. at 647 (striking down racial gerrymander because "[i]t reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls").

B

"Among the various narrow tailoring requirements, there is no doubt that consideration of race-neutral alternatives is among the most important." *Coral Constr.*, 941 F.2d at 922. Appellees fail to satisfy this requirement. Specifically, appellees neglected to undertake any consideration—let alone "serious, good faith consideration," *id.* at 923—of one obvious race-neutral alternative: the establishment of one or more additional laboratory elementary schools in areas of California where the demographic diversity would naturally produce applicant pools with any desired racial/ethnic mix. UES is currently California's only state-supported laboratory school and is necessarily limited to an applicant pool that is drawn from Westwood and its environs. But nothing limits California to only one laboratory school.[21]

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[21] According to Mitchell, three other University of California (continued...)

Appellees only response is to cite *Coral Construction* for the proposition that they are not required to "exhaust every alternative, however irrational, costly, unreasonable, and unlikely to succeed." *Id.* at 923 (alteration omitted). However, *Coral Construction* teaches that a state must "exhaust race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective." *Id.* California certainly has the authority to authorize the establishment of new laboratory schools, and appellees have failed to carry their burden of showing that such an alternative would not "have a reasonable possibility of being effective."

Another reasonable race-neutral option would be for UES to conduct its research on "the ethnically diverse student population now present in the urban school community." *Hunter*, 971 F. Supp. at 1328. The district court held that appellees had demonstrated that "the race and ethnicity-oriented research conducted at UES could not otherwise be performed in the actual urban elementary schools" in California.[22] *Id.* at 1332. The district court erred in discounting "the efficacy of [this] alternative," *Paradise*, 480 U.S. at 171 (plurality

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[21] (...continued)
campuses (i.e., San Diego, Santa Cruz and Irvine) are presently discussing plans to build their own research-oriented laboratory schools. He testified, however, that he "ha[d] no idea" whether the naturally occurring diversity around those campuses would produce a sufficiently diverse applicant pool to obviate the need for racial quotas. Mitchell also testified that he "ha[d] not undertaken to ask the question [whether] any of the other nine campuses of the University of California" outside of UCLA are sufficiently diverse to eliminate the need for racial quotas.

[22] The district court's conclusion that this race-neutral alternative was unavailable presents a mixed question of law and fact that we review de novo. *See National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1993).

opinion). This race-neutral alternative clearly has a "reasonable possibility of being effective." *Coral Constr.*, 941 F.2d at 923.

The district court found that existing public elementary schools would not allow teachers and researchers to control such things as class size, age groupings or student-teacher ratios. *See Hunter*, 971 F. Supp. at 1332. This is hardly an insuperable barrier. Any public school policies or procedures that present a potential impediment to conducting research in the public schools could be modified or eliminated, as appropriate, by the Board of Education and/or the California legislature.[23]

The district court also found that ensuring necessary levels of parental involvement in, and cooperation with, research carried out in public schools would be difficult. *See id.* The district court cited Professor Harry Handler's testimony that "depending on voluntary participation by parents produces additional bias in the study being undertaken through the self-selection involved in volunteering. At UES, in contrast, parents . . . agree to participate in all of the types of activities.[24] Appellees produce no evidence, however, that the putative "bias" caused by self-selection in a public school context could

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[23] The California legislature has shown itself willing to support the establishment of nontraditional schools. For example, as appellant notes, the California legislature enacted the Charter Schools Act of 1992, Cal. Ed. Code §§ 47600, et seq., which authorized the creation of up to 100 charter schools to, inter alia, "[e]ncourage the use of different and innovative teaching methods," Cal. Ed. Code § 47601(c).

[24] I note in passing that neither Professor Handler, nor any other of appellees' witnesses, explained how the "bias" resulting from the "self-selection" of public school parents differs from the bias resulting from the "self-selection" of UES parents who, as a condition of their childrens' enrollment, agree to participate in research projects as needed.

not be substantially or totally eliminated by simply offering suitable incentives (e.g., tax credits or cash payments) to ensure that parents participate in any research as required.

The district court, referring to Professor Ronald Gallimore's testimony, found that "attrition of teachers and school support"[25] presented a significant obstacle to educational research in public schools. *Hunter*, 971 F. Supp. at 1332. At trial, Professor Stipek expressed a similar view, stating that "[a] laboratory school . . . needs teachers who are experienced working with researchers and who understand and accept that their job responsibilities require them to collaborate with researchers, to try, experimentally, innovative practices, and to evaluate those new methods and practices." These practical concerns are not, however, insurmountable.

Appellees fail to demonstrate why public school teachers could not be provided with any requisite training and then induced, or even required through contract, to collaborate with UES researchers. Even if public school teachers could not be utilized, appellees offered no evidence showing that UES teachers and research teams, given appropriate support and authorization from the California legislature and/or the Board of Education, could not simply be placed at certain public schools as their research requires. Furthermore, the lack of public school "support" for educational research could easily be addressed through appropriate state legislation and/ or changes in public school policy and operating procedure.

Finally, even if appellees' theory of racial reductionism were valid, there is no reason for UES not to eschew the use of race in its admissions procedure and instead to choose students based on their particular "learning style." A properly

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[25] Professor Gallimore described this lack of "school support" as follows: "researchers can be asked to leave with no notice by a principal or superintendent even after years of investment and effort."

constructed test, or series of tests, could allow UES to identify children who display whatever "learning style" it wished to study "without resorting to stigmatizing and fractionalizing racial classifications," *Coral Constr.*, 941 F.2d at 923. Given this possibility of an individualized admissions method, the only plausible explanation for appellees' use of a race-based system "would seem to be simple administrative convenience," *Croson*, 488 U.S. at 508. That defense is unacceptable. Appellees' interest in avoiding the bureaucratic effort necessary to tailor UES's admissions procedure to race-neutral factors "cannot justify a rigid line drawn on the basis of a suspect classification." *Id.*

C

Appellees' offer essentially six rationales to justify their reliance on race in the UES admissions process, namely: to ensure funding;[26] to study the race-specific "learning styles" of children; to publish the results of research; to disseminate the results of research; to train future researchers and teachers; and to meet the requirements of specific studies. These rationales cannot justify the racial quotas that UES employed.[27]

The "funding" rationale is legally untenable, as "a State may not protect the public fisc by drawing an invidious

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[26] Professor Stipek testified, for example, that racial/ethnic diversity is necessary. to secure funding from the National Institutes of Health, a "primary outside funding source for childhood education research."

[27] UES admitted exactly 18 Caucasian (39.1%), 10 Latino (21.7%), 8 mixed-race (17.4%), 6 African-American (13%), and 4 Asian (8.7%) students. Although appellees' witnesses preferred to characterize these numbers as "general targets" or "general goals," rather than outright quotas, UES "appeared to be especially adept at meeting its yearly 'goals.'" *Hopwood*, 78 F.3d at 948 n.36. UES did so, as Professor Stipek explained, by translating any "goal" into a "specific number" in the course of making admissions decisions.

distinction between classes of its citizens." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974). Further, as best one can discern, the rationales based on the race-based "learning styles" of children, the desire to publish and disseminate research results,[28] and the need to train future researchers and teachers, all appear to require only some general level of racial/ethnic diversity. Appellees' expert witnesses testified, for example, that: UES requires "a diversity *comparable in rough terms* to urban schools" (Professor Saxe) (emphasis supplied); "it is imperative that UES have a student population that is perceived and accepted as being *representative* of the population in the public schools" (Professor Handler) (emphasis supplied); UES needs "the *kind of diverse populations that challenge . . . schools all over the state*" (Professor Gallimore) (emphasis supplied). Professor Stipek, director of UES, testified that the required "diversity" at UES would need to include some unspecified "critical mass" of each significant ethnic group represented in the urban school population, but conceded that she could not "give specific percentages." Plainly, this need for some undefined level of racial/ethnic diversity at UES bears scant relation, let alone the constitutionally required "exact connection," *Adarand*, 515 U.S. at 229 (internal quotation marks omitted), to the use of a racial/ethnic quota system.

The rationale premised on the need for racial/ethnic diversity in specific studies conducted at UES also lacks any kind of connection to the racial/ethnic quotas used. The only studies mentioned by appellees' expert witnesses were a

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[28] The publication and dissemination rationales are based on the need to maintain credibility among the academic and teaching communities. According to Professor Stipek, members of these communities would "question the relevance"of UES's research unless it had "a population of children and families that reflects the diversity of California's urban public schools."

bilingual research project involving native Spanish and English speaking students, and an instructional program being developed on the Harlem Renaissance. The bilingual study only requires the selection of children based on their native language, and is therefore irrelevant to any purported need for racial/ethnic diversity or racial quotas. The Harlem Renaissance project is geared solely toward African-American students and it does not, even by its own terms, require any specific number of those students. Thus, it, too, lacks any connection to UES's asserted need for a set number of students from different racial/ethnic groups.

D

Finally, UES's utilization of a mixed-race category is a "red flag[]" signaling that its admissions procedure "is not, as the Equal Protection Clause requires, narrowly tailored." *Monterey Mech.*, 125 F.3d at 714. Indeed, UES's racially classified admissions system is overinclusive. The theory underlying UES's research mission is, in important part, that a child's race/ ethnicity is specifically tied to a distinct "learning style." But if this is true, the targeted selection of mixed-race children is incomprehensible—how could such a theory possibly require the selection of mixed-race students? Use of this puzzling category is compelling evidence that UES's admissions method is not narrowly tailored. *Cf. Croson*, 488 U.S. at 506 ("random inclusion of racial groups that . . . may never have suffered from discrimination . . . strongly impugns the city's claim of remedial motivation"); *Wygant*, 476 U.S. at 284 n.13 (plurality opinion) ("The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan.") (citation omitted).

Appellees only attempted justification for the anomalous presence of a mixed-race category in UES's admission procedures came from Professor Stipek. She claimed that "many children identified in California statistics in a single

ethnic category are in fact of mixed ethnicities," and noted that "researchers . . . as well as government organizations . . . are working on alternative strategies to collect ethnicity data that do not force individuals into single categories." Accordingly, Professor Stipek explained that it was "inappropriate" to require multi-ethnic applicants to choose just one racial/ethnic category. This explanation manifestly fails to explain how the theory of race-specific "learning styles" justifies the selection of mixed- ace students. The use of a mixed-race category: in UES's admissions procedure is simply irreconcilable with the "onerous 'narrowly tailored' requirement," *Wygant*, 476 U.S. at 294 (O'Connor, J., concurring).

V

I would reverse the judgment of the district court. UES's racially classified admissions procedure does not comport with the Equal Protection Clause of the Fourteenth Amendment. In my judgment, Hunter is "entitled to reapply under an admissions system that invokes none of the[] serious constitutional infirmities," *Hopwood*, 78 F.3d at 962, discussed in this opinion.

I respectfully dissent.

Appendix B:1

Filed 4/20/00

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELEY TATSUYO HUNTER, a minor, by GINA F. BRANDT, her mother and next friend,	)	No. 97-55920
	)	ORDER
Plaintiff-Appellant,	)	
v.	)	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and THEODORE R. MITCHELL,	)	
Defendants and Appellees.	)	

Before: PREGERSON, BEEZER and HAWKINS, Circuit Judges.

The panel, as constituted above, voted to deny appellant's petition for rehearing. Judges Pregerson and Hawkins voted to reject the suggestion for rehearing en banc and Judge Beezer so recommended said rejection.

The suggestion for en banc rehearing has been circulated to the full court and no judge of the court has requested a vote on the suggestion for rehearing en banc.
Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C:1

Filed 6/20/97
Entered 6/23/97

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEELEY TATSUYO HUNTER, a minor, by GINA F. BRANDT, her mother and next friend, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and THEODORE R. MITCHELL, Defendants.	CV 95-3301 KN TRIAL ORDER RE: FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Keeley Tatsuyo Hunter, ("Hunter" or "Plaintiff"), a minor, brings this action by Gina F. Brandt ("Brandt"), her mother and next friend, against defendants The Regents of the University of California ("the Regents") and Theodore R. Mitchell, Dean of the Graduate School of Education and Information Studies ("GSE&IS") and Vice Chancellor of Academic Planning and Budget at the University of California, Los Angeles ("Dean Mitchell"). Having previously granted the defendants' motion for judgment on the pleadings as to Plaintiff's first and third causes of action,[1] the Court conducted

[1] The Court granted the Regents' motion for judgment on the pleadings as to Plaintiff's first and third claims for relief on the grounds of Eleventh Amendment immunity; *See* Order Re: P.'s Mot'n for Reconsideration, Aug. 21, 1996, at 9:19-22. The Court also granted Dean Mitchell's motion for judgment on the pleadings as to Plaintiff's third cause of action because Plaintiff's claim is covered by

(continued...)

a two-day bench trial on Plaintiff's remaining claims. Based on the evidence and arguments presented at trial, the Court sets forth its findings of fact and conclusions of law as follows:

I. PARTIES AND JURISDICTION

Hunter is a female child born on November 26, 1990. She is a United States citizen who claims her ethnic identity as one-quarter Asian and three-quarters Caucasian. This suit is brought on Hunter's behalf by her mother and next friend, Brandt.

The Regents is a corporation vested with legal title and the management and disposition of the property of the University of California, with the power to be sued, as provided by Section 9, Article IX of the California Constitution. The Regents receive substantial federal financial assistance and, for the purposes of this suit, admit to being a state actor.

Dean Mitchell is currently Vice Chancellor of Academic Planning and Budget at UCLA, and remains Dean (on leave) of the GSE&IS. Dean Mitchell was Dean of the GSE&IS during the 1995-96 admissions cycle during which the Plaintiff's application to the Corinne A. Seeds University Elementary School ("UES"), which is operated by the GSE&IS, was submitted and denied. Dean Mitchell is sued solely in his official capacity.

Hunter brings this action against the Regents under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d),[2] and

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[1] (...continued)
the exclusive remedy offered by 42 U.S.C. section 1983. Id. at 11:23-2:3.

[2] Title VI provides that, 'No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

against Dean Mitchell under 42 U.S.C. § 1983[3] based on the defendants' alleged illegal and unconstitutional acts of discrimination. Federal jurisdiction is proper under 28 U.S.C. §§ 1331 and 1367 in that the instant action arises under the Constitution and laws of the United States. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) in that all parties reside in the Central District of California and a substantial portion of the events giving rise to the Plaintiff's claims occurred in this District.

II. HISTORY OF THE CASE

UES is a laboratory elementary school operated by UCLA's GSE&IS. UES has a student population of approximately 460 children, ages four through twelve, who attend pre-kindergarten through sixth grade.[4] The stated mission of UES is to conduct research relevant to the urban educational experience and to work with teachers, communities and schools to disseminate that research to foster a more effective educational system primarily for urban elementary students.[5]

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[3] Section 1983 provides in relevant part:

> Every person who, under color of any statute . . ., subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] UES is the only publicly supported elementary laboratory school in this State. Deborah J. Stipek is a Professor at GSE&IS and the current Director of UES. Professor Stipek was Director of UES during the 1995-96 admissions cycle.

[5] For instance, UES's research methods and results are shared with the GSE&IS's Urban Education Studies Center where nationally

(continued...)

On or about December 12, 1994, Plaintiff's mother Gina F. Brandt signed, and Plaintiff's father, James K. T. Hunter, authorized Brandt to sign on his behalf, the 1995-1996 Admissions Application seeking their child's admission to the 1995-1996 UES entering class for four-year-olds (the Early Childhood or EC-1 Program). Brandt submitted the application form for consideration to UES. Plaintiff was one of 215 applicants for admission to the 1995-1996 EC-1 Program, 46 of whom received admission. In the section of the Admissions Application entitled "Child's Ethnic Identity (optional)," Plaintiff was identified by Brandt as "Asian-American (specify): Japanese" and "Caucasian." Unfortunately, Plaintiff's parents were notified on March 11, 1995, that their daughter had not been selected for admission to the 1995-96 EC-1 class. As a result, Plaintiff brought the instant suit challenging the constitutionality of UES's admission policy.

By order filed on September 18, 1995, this Court granted Hunter's application for a preliminary injunction requiring her admission to the 1995-96 EC-1 class. Hunter is currently enrolled in her second year at UES, essentially kindergarten.

On July 25, 1996, the Court ruled that Dean Mitchell is entitled to the defense of qualified immunity to Plaintiff's claim for damages. *See* Order Re: Def. Theodore Mitchell's Mot'n for Summ. Adjud., July 29, 1996, at 9:4-16. In a separate order dated the same day, the court granted the Regents' motion for summary judgment against Plaintiff's claims of discrimination based on the admission criteria of wealth, fame, and political influence. *See* Order Re: Def. Regents Mot'n for Summ. Judg., July 25, 1996, at 10:6-12.

Subsequently, on August 21, 1996, the Court denied Plaintiff's motion for summary adjudication of the legal issues

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[5] (...continued)
recognized scholars work together with educators and administrators to foster a better schooling system for California children.

in her remaining claim that UES's race/ethnicity admission criteria violate the Fourteenth Amendment. The Court held that factual issues remained as to whether the use of race/ethnicity in the admissions process (1) serves a compelling state interest, and (2) is narrowly-tailored to accomplish this goal. These issues -- framed as Plaintiff's Title VI claim against the Regents and 42 U.S.C. § 1983 claim against Dean Mitchell -- are all that remain of the current action.

III. FINDINGS OF FACT

A. UES's Admission and Recruitment Policies

The UES Admissions Committee is comprised of three UES teachers and two GSE&IS faculty members, one of whom serves as the committee chairperson. The admission process does not entail pre-selection interviews, achievement/ability testing or competitive criteria rankings of the applicants.

As part of its admission policy, UES does not consider the race of its applicants for the purpose of enhancing the educational opportunities of disadvantaged children admitted to the school; nor does UES consider its applicants' ethnicity to improve the general educational experience for the admitted students by promoting diversity in the classroom. In addition, the Admissions Committee does not consider race or ethnic background as a remedy for past societal discrimination. Rather, UES considers its applicants' races and ethnic identities only in an attempt to obtain an adequate cross-sample of the general population for the purpose of maintaining the scientific credibility of its educational studies. Students enrolled at UES are research subjects and are covered by all federal, state and university guidelines, rules and policies regarding the treatment of human subjects.

To achieve the ethnically diverse population of students allegedly necessary for its educational research program, UES conducts extensive recruiting and outreach programs designed to increase the number of minority and disadvantaged

applicants. Such outreach efforts include advertising in local newspapers with large minority readership, distribution of information about UES to the directors of other ethnic studies programs at UCLA, and dissemination of thousands of mailers and flyers to UCLA campus departments, current UES parents, and off-campus organizations such as Head Start Centers.

B. 1995-96 EC-1 Class Admission Policy and Statistics

For the 1995-96 school year, the Admissions Committee utilized the following procedure in selecting applicants for admission to the EC-1 Program:

First, the 20 siblings of current UES students who applied for admission were identified and admitted;[6]

Second, the Admissions Committee, under the guidance of Dean Mitchell and Professor Stipek, formulated a target number for each racial/ethnic group to be admitted;

Third, dominant Spanish-speaking applicants were identified and a number of them were selected for admission;[7]

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[6] Plaintiff's older sister, Cia, graduated from UES just prior to the time of Plaintiff's application. Accordingly, Plaintiff was not considered for admission as a sibling of a currently enrolled student. During Cia Hunter's term of enrollment at UES, both James K. T. Hunter and Gina Brandt became parent volunteers in UES's Early Childhood Unit. Brandt served on the Board of the Family School Alliance and as President and Co-President of the Family School Alliance which fought to keep UES situated on the UCLA campus in Westwood, California. Brandt was also a founding member of the UES Family Alumni Association and served on the fundraising committee for the Friends of UES.

[7] Plaintiff does not challenge UES's decision to admit a larger sample of Spanish-speaking students as the basis for research in bilingual educational methods.

Fourth, applicants from each self-identified racial/ethnic group were chosen at random to create a shorter list of potential admittees;[8]

Fifth, from the children randomly selected within each racial/ethnic classification, further sorting was done to ensure a reasonable gender balance and to distribute the admitted children among income groups.

UES also admits a limited number of children each year, in the discretion of the Dean of the GSE&IS, to further the mission of UES and to advance the interests of UCLA, including recruiting faculty and staff for the University. In the 1995-96 admission year, these "Dean's admits" were substituted for randomly-selected children with the same gender, race/ethnicity and income as would have otherwise been granted admission.

In selecting students to be admitted to the 1995-96 EC-1 Program, UES sorted all applicants into six racial categories: African-American, Asian-American, Native American, Latino, Caucasian, and Other (Mixed Race). The demographic racial breakdown of the 215 children who applied for admission into the 1995-96 EC-1 Program, as self-reported, was as follows: 110 Caucasians (51.2%); 49 mixed race (22.8%); 23 African-Americans (10.7%); 19 Asians (8.8%); and 14 Latinos (6.5%). The demographic racial breakdown of the 46 children admitted into the 1995-96 EC-1 Program was as follows: 10 Latinos (21.7%); 6 African-Americans (13%); 4 Asians (8.7%); 18 Caucasians (39.1%); and 8 mixed race (17.4%).

The pool of 215 applicants consisted of 110 girls and 105 boys. Twelve (12) girls were siblings and eight (8) boys were siblings. As previously mentioned, all 20 of the sibling applicants were admitted. Twenty-six (26) of the remaining 195

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[8] Selection from within these groupings was accomplished by computer-generated random numbers.

non-sibling applicants were selected for admission (13.3%). Ninety-eight (98) of the remaining 195 non-sibling applicants were girls (50.3%), and of these, twelve were admitted (12.2%).

The pool of 49 applicants who self-identified themselves as mixed race consisted of 23 girls and 26 boys. Three of the girls were siblings (each admitted), and none of the boys was a sibling. Therefore, of the eight mixed race admittees (4 girls and 4 boys), five mixed race non-sibling children were selected from the applicant pool of 49 (10.2%). Only one self-identified female non-sibling mixed race child was selected from the relevant applicant pool of 20 female non-sibling self-identified mixed race applicants (5%).[9]

IV. LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Plaintiff's remaining claims aver that by UES's use of racial and ethnic admission criteria, the Regents and Dean Mitchell discriminated against her in violation of her Fourteenth Amendment right to equal protection under the law. U.S. Const. amend. XIV, § 1; 28 U.S.C. § 1983; 42 U.S.C. § 2000(d) (Title VI). However, based on the above-described factual findings, and the legal analysis provided below, the Court believes that the defendants are not liable for the alleged violation of Plaintiff's constitutional right to equal protection.

A. Standard of Review and Burden of Proof

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.

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[9] Of the 46 children initially accepted for the 1995-96 EC-1 Program, 24 were girls and 22 were boys. In addition, 15 of the children (33%) were from families with annual incomes below $35,000; 4 (30%) were from families with annual incomes from $35,000 to $119,999; and 17 (37%) were from families with annual incomes of $120,000 or more.

amend XIV, § 1. The threshold question for any constitutional claim founded upon equal protection grounds is whether the challenged governmental action treats differently two otherwise similarly situated individuals. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (upholding California Proposition 13's Article XIIIA amendment to the California Constitution); *see also The Coalition for Economic Equity v. Wilson*, 97 Daily Journal 4552, 4556 (9th Cir., Apr. 9, 1997) ("The first step in determining whether a law violates the Equal Protection Clause is to identify the classification that it draws."). Once it is established that the government action uses race or ethnicity as a basis by which to separate similarly situated persons, a court's legal analysis must turn towards a determination of the legality of the classification.

Governmental racial and ethnic classifications have a tendency to stigmatize individuals, polarize society, and incite racial hostilities. *See Shaw v. Reno*, 509 U.S. 630, 643 (1993) ("*Shaw I*"); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Persons disadvantaged by such racial or ethnic categorizations necessarily suffer a cognizable .injury. *See Adarand Constructors v. Pena*, 515 U.S. __, 115 S. Ct. 2097, 14 (1995). Therefore, in order to pass constitutional muster, a racial classification, regardless of its purported motivation, must be narrowly tailored to serve a compelling government interest. *See, e.g., Id.* at 13; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *see also the Coalition for Economic Equity, supra*, at 4556.[10] The burden traditionally rests with the state actor to justify the offending classification scheme in the face of this strict scrutiny. *See*

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[10] This "standard of review under the Equal Protection Clause does not depend on the race . . . of those burdened or benefited by a particular classification." *The Coalition for Economic Equity*, supra, at 4556 (vacating preliminary injunction of California's Proposition 209) (citing *Richmond v. J.A. Croson*, 488 U.S. 469, 494 (1989) (plurality opinion)).

Shaw I, supra, at 642-43 & 653 (requiring strict scrutiny of all racial classifications because without it, courts cannot determine whether the challenged discrimination is truly "benign").[11]

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[11] The defendants also challenge the Court's previous holding that Plaintiff should be "entitled to a permanent injunction directing her admission to UES unless [the] Regents can carry its burden of establishing that Plaintiff would not have been admitted even if the Race/Ethnicity Selection Criterion had not been utilized." *See* Memo. of Cont. of Fact and Law of Defs., filed Nov. 18, 1996, at 28:14-18. The defendants maintain that the Supreme Court's decision in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993), places the ultimate burden of persuasion to prove discrimination on the Plaintiff. The Court disagrees with the defendants' attempted application of *Hicks*, a Title VII case, to the case at bar. Unlike the employment discrimination situation litigated in Hicks, the defendants in this case do not contest their intentional use of racial and ethnic considerations in the UES admission policy. *See infra* note 12. As a result, the Court need not engage in the burden shifting analysis normally associated with Title VII cases. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In reviewing this use of race and ethnicity criteria, the Court believes it is bound to apply a standard of strict scrutiny. *Adarand, supra*, at 2113.

The defendants may be correct that even if Plaintiff were to prevail, she would not be entitled to a permanent injunction requiring her admission to UES, but rather to an order permitting her reapplication to the school under new constitutional admission criteria. However, such a ruling is made moot by the Court's ultimate judgment that the UES race and ethnicity criteria actually survive strict scrutiny review. *See United States v. Virginia*, ___U.S. ___, 16 S. Ct. 2264, 2282 (1996) (finding that the categoric~ exclusion of women from the state-sponsored Virginia Military Institute violated the Equal Protection Clause, but holding that the remedial decree must place the plaintiffs in the position in which they would have been absent the discrimination); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 n. 54 (1978) (Powell, J.) (finding that "there [was]

(continued...)

B. Unequal Treatment of Similarly-Situated Applicants

As previously discussed, the first step in any analysis of an equal protection claim is to determine whether or not the contested form of discrimination actually treats similarly situated individuals in a disparate fashion. *The Coalition for Economic Equity, supra*, at 4556. The Fourteenth Amendment does not require that the State treat all citizens identically, but rather only that those individuals who are similarly situated be treated equally. *See Nordlinger, supra*, at 10 (holding that the "Equal Protection Clause does not forbid classifications,' but 'simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike') (*citing F.S. Royster Guano Co. v. Virginia*, 252 U.S. 412, 415 (1920)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

The defendants assert that in the case of UES's admission procedures, no similarly situated applicants for the EC-1 class were treated differently based upon their self-proclaimed race or ethnic identity. The Court disagrees.[12] The UES Admissions

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[11] (...continued)
no question as to the sole reason for [Bakke's] rejection -- purposeful racial discrimination in the form of the special admissions program"); *accord Hopwood v. State of Texas*, 78 F.3d 932, 958 (5th Cir. 1996) (plaintiffs were entitled to reapply to University of Texas Law School under a system of admissions that did not discriminate on race), *cert. denied*, __U.S. __, 116 S. Ct. 2581.

[12] The defendants provide no argument why the Court's analysis should not start from the premise that Plaintiff was similarly-situated with other applicants, and therefore deserved to be treated in an equal manner with other applicants. It would be circuitous for the defendants to contend that Plaintiff's application was justifiably treated in a dissimilar fashion because of her race. Furthermore, the Court is convinced that the defendants' use of racial classifications
(continued...)

Committee separated the 215 total applicants into different racial and ethnic categories. After all 20 of the sibling-related applicants were admitted, a random lottery system was used to make an initial selection of a previously determined target number[13] of children from each racial category to whom offers of admission might be extended. This randomly selected group of admittees was then adjusted following a further sorting to balance the class in terms of gender and income levels. Naturally, the chances for selection from any one of the sorted groups depended upon: (1) the number of non-sibling applicants in that group; (2) the total number of applicants in that group; (3) the number of "Dean's admits" in that category; and (4) the previously determined target percentage of children from that category that the defendants felt was necessary to obtain the research population required to fulfill the school's mission. However, the Admissions Committee's employment of a lottery does not negate its initial disparate treatment of similarly situated persons as a result of having first divided the

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[12] (...continued)
was a form of intentional discrimination. While the defendants may have acted in good faith, they purposefully employed the use of racial and ethnic admissions criteria. *See Hopwood*, 78 F.3d, at 957 (5th Cir. 1996) (reviewing University of Texas Law School's admission policy) (citing, *inter alia, Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)).

[13] The parties squabble over the whether the Admissions Committee's predetermined percentage of children to be admitted from each racial category should be classified as a racial "quota" or merely a "target-preference." Given the nature of this case, the Court does not believe it necessary to make such a semantic distinction. As discussed below in greater detail, the Court believes UES's admission policy treated similarly-situated individuals differently. *See infra* (comparing UES's admission policy to the University of California at Davis Medical School's admission policy at issue in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). As a result, the Court must apply a strict standard of judicial review.

applicants by their race and ethnicity. The fact that each applicant's chances for admission were necessarily benefitted or disadvantaged by his or her racial identity compels a finding that the defendants' creation of racial targets and categories must withstand strict scrutiny.

The defendants' attempt to distinguish procedurally their admission policy from the "dual admission program" invalidated in *Bakke* provides little support.[14] In *Bakke*, the Supreme Court determined that Davis Medical School's policy of reserving 16 of 100 admission slots for certain disadvantaged minority applicants, while still permitting those disadvantaged minorities to compete for the remaining 84 slots, violated the Equal Protection Clause. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (Powell, J.). In so ruling, the Court made clear that it is the individual, not the group, who is entitled to judicial protection from classification based upon race or ethnic background. *Id.* at 299; *see also Adarand, supra*, at 12-13; *The Coalition for Economic Equity, supra*, at 4559. "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand, supra*, at 11. This is because "there is simply no way of determining [without strict judicial review] what classifications are 'benign' or 'remedial' and what Classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 12 (quoting *Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (plurality)).

Similar to Bakke's chances of being admitted to Davis Medical School, Plaintiff's chances of being accepted to UES

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[14] The defendants are successful, however, in proving that the UES admission policy is substantively distinct from the University of California at Davis Medical School's admission program. *See infra* sections IV.C. & D. (concluding that UES's admission policy is narrowly tailored to support a compelling state interest).

were impacted by the number of applicants who self-identified themselves with the same or different racial and ethnic identity. Plaintiff challenges the Admissions Committee's decision to separate the applicants by race and ethnicity in the first place. For this reason, UES's admission policy cannot be shielded from strict scrutiny simply because Plaintiff was not directly competing for the same admission slots as applicants who self-identified in a different racial category, even if all categories were subject to the same lottery system. *Bakke, supra*, at 315 (holding that a "multitrack program with a prescribed number of seats set aside for each identifiable category of applicants," as opposed to the two-track system at issue in Bakke, would still be subject to strict scrutiny). The Admissions Committee's ethnic and racial target preferences undoubtedly influenced Plaintiff's chances for admission. As a result, Plaintiff deserves a strict judicial review of the UES admission policy.

C. Compelling Governmental Interest

The defendants proffer two reasons why the UES admission policy furthers a compelling governmental interest: (1) the state has a compelling interest in research on effective urban educational strategies, including dissemination of acquired knowledge about current or innovative educational practices; and (2) the state has a compelling interest in promoting academic freedom as embodied by the First Amendment. In response, Plaintiff maintains that because UES's admission procedures are not designed to remedy past or present forms of discrimination, they cannot *per se* rise to the level of a compelling state interest. Plaintiff further contends that the two justifications are too amorphous and lack sufficient evidentiary grounding to withstand strict scrutiny.

Having considered the parties' testimony and analyzed their legal arguments in terms of the factual situation of this particular case, the Court is persuaded that the defendants' interest in operating a research-oriented elementary school is

compelling. The Court does not agree with the defendants that the promotion of academic freedom, by itself, can justify racial classifications. *See Bakke, supra*, at 314 (Powell, J.) ("Although a [school] must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."). On the other hand, the state's interest in maintaining academic freedom offers significant support for the defendants' argument that the Court should accord deference to the necessity of racial diversity for the research conducted at UES.[15]

1. Remedying Past Discrimination Is Not the Only Compelling State Interest

Plaintiff relies on the Supreme Court's plurality decision in *Croson* to support the proposition that, as a matter of law, remedying past discrimination is the only compelling state interest that will support race-conscious state action. *See Croson*, 488 U.S., at 469 (O'CONNOR, J., for plurality). Yet, a careful reading of *Croson* and the line of cases derived from it leads the Court to conclude that Plaintiff misinterprets the scope of Justice O'Connor's plurality reasoning in *Croson*.

In *Croson*, Justice O'Connor warned that, "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *Croson, supra*, at 493. Justice O'Connor's opinion was joined only by Chief Justice Rehnquist, Justice White, and

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[15] *See University of Penn. v. EEOC*, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgment. This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.'") (citation omitted).

Justice Kennedy;[16] certainly not a majority opinion of the Court.[17] However, Justice Stevens, who had otherwise joined Justice O'Connor in announcing the majority opinion, wrote separately to express his belief that remedial motivations are not the only legitimate form of a compelling state interest. *Id.* at 511 n. 1 ("In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes.").[18] As far as this Court may ascertain, no

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[16] Justice Kennedy's concurrence in *Croson*, despite its joinder with all but Part II of Justice O'Connor's opinion, does not seem to whole-heartedly support the view that remedial measures are the only legitimate compelling state interest. Justice Kennedy refused to adopt a rule of automatic invalidity for all racial preferences; but instead chose to reaffirm the case-by-case application of strict scrutiny, noting that "the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality." *Id.* at 519.

[17] In addition, one would be hard-pressed to assume that Justice Marshall, Justice Blackmun, and Justice Brennan, all of whom dissented from the *Croson* majority (albeit without explicit repudiation of the plurality portion of the opinion) would support the belief that remedial actions are the sole form of a compelling state interest. *Id.* at 528-62.

[18] Justice Stevens' reiteration in *Croson* of his own dissent in *Wygant v. Jackson Board of Education* deserves repetition here:

> [I]n our present society, race is not always irrelevant to sound governmental decisionmaking. To take the most obvious example!; in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior -- and if the members of the group are all of the same race -- it would seem perfectly rational to employ

(continued...)

majority of the Court has ever explicitly held that remedial action may constitute the only valid compelling state interest.

Plaintiff's reliance on *Croson* is in no way strengthened by her attempted application of subsequent Supreme Court rulings in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612-13 (1990) (O'CONNOR, J., dissenting) (restating *Croson* plurality), and *Adarand Constructors, Inc. v. Pena*, __U.S. ___, 115 S. Ct. 2097 (1995), *overruling in part, Metro Broadcasting.*[19] In *Metro Broadcasting*, the Supreme Court upheld the Federal Communication Commission's minority broadcasting benefits program" In so doing, a majority of the Court considered the FCC's form of discrimination to be benign, despite its admitted lack of remedial purpose, and applied only intermediate scrutiny to its review of the program. *Metro Broadcasting, supra*, at 566. In support of its holding, the majority quoted Justice O'Connor's apparently inconsistent prior opinion in *Wygant v. Jackson Board of Education. Id.* at 568 n.15. In *Wygant*, Justice O'Connor noted that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher

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[18] (...continued)

> an agent of that race rather than a member of a different racial class.

Croson, supra, at 512 n.2.

[19] Plaintiff's argument also appears undermined by the Supreme Court's holding in *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"). In *Shaw I,* the Supreme Court reviewed the constitutionality of a North Carolina redistricting plan. Justice O'Connor, writing for the majority, noted a "significant state interest in eradicating the effects of past racial discrimination." *Id.* at 656. However, she also recognized North Carolina's attempt to justify its gerrymandered majority-minority redistricting on its supposed need to comply with the federal Voting Rights Act, a "compelling interest entirely distinct" from an attempt to eradicate prior racial stigmatization. *Id.* at 653-54, 656.

education, to support the use of racial considerations in furthering that interest." *Wygant, supra*, at 286 (O'CONNOR, J., concurring in part and concurring in judgment). She further added that, "nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' . . . ." *Id.*

In an attempt to buttress the *Metro Broadcasting* majority's opinion from Justice O'Connor's dissent, Justice Stevens again wrote separately to declare that, "Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong." *Id.* at 601 (STEVENS, J., concurring).

In *Adarand Constructors, Inc. v. Pena*, the Supreme Court overruled the *Metro Broadcasting* opinion and held that all racial classifications, regardless of their supposedly benign motivation, are subject to strict scrutiny. *Adarand, supra*, at 33. However, the *Adarand* Court, whose opinion was authored by Justice O'Connor, did not explicitly overrule the judgment arrived at by the *Metro Broadcasting* Court. In other words, the *Adarand* Court did not decree that the FCC's form of discrimination based on diversity, not remedial action, would necessarily fail under a review of strict scrutiny.[20] Justice Stevens, with whom Justice Ginsburg joined in dissent, pointed out that:

> The majority today overrules *Metro Broadcasting* only in so far as it is "inconsistent with [the] holding" that

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[20] Only Justice Scalia and Justice Thomas penned concurring opinions to express their view that under no circumstances can remedial measures for past discrimination justify racial discrimination. *Adarand, supra*, at 18-19 (respectively, concurring in part and concurring in judgment).

> strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. Ante, at 13. The proposition that fostering diversity may provide a sufficient interest to justify such a program in [*sic*] not inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case -- and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.

Id. at 27-28 (STEVENS, J., dissenting).

In a final effort to convince this Court to follow the *Croson* plurality, Plaintiff urges the Court to conform its ruling to those non-mandatory decisions already reached by other Circuit Courts. *See Contractors Assoc. of Eastern Penn. v. City of Phil.*, 91 F.3d 586, 596 (3rd Cir. 1996) (challenge to city's contractor set-aside program); *Hopwood v. State of Texas*, 78 F.3d 932, 944-45 (5th Cir. 1996) (finding University of Texas Law School's admission policy unconstitutional), *cert. denied*, 116 S. Ct. 2581; *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992) (contesting university's minority scholarship program); *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991) (challenging minority subcontractor preferences), *cert. denied*, 500 U.S. 954 (1991). Plaintiff argues that the [*sic*] this Court should be cautious of creating a conflict with other Circuits' opinions in the absence of an "abiding conviction" that those contrary holdings are unreasonable. *International Soc. for Krishna Consciousness v. Lee*, 935 F.3d 576, 690 (2nd Cir. 1991), *aff'd in part*, 502 U.S. 1022 (1992) (refusing to differ from a considerable weight of contrary and reasonable authority "lest the Supreme Court's ability to resolve conflicts among the circuits be impaired by the sheer number of conflicts").

Given the nature of the issues currently at hand, the Court must reject Plaintiff's suggestion that it not express a different opinion solely for the sake of easing an already overcrowded

Supreme Court docket. It seems that in almost every term, the Supreme Court is forced to consider a new case with unique factual situations that altered or affected the lower court's review of a state-based racial classification. Unfortunately, this case raises many issues which prevent it from fitting neatly in line with one of the Supreme Court's prior rulings, or the other Circuit Courts' interpretations of those rulings.

The Court does not have an "abiding conviction" in the "reasonableness" of the Third, Fourth, Fifth,[21] and Seventh Circuits' judgments, all of which base their holdings on an interpretation of *Croson* previously rejected by this Court. In reliance upon the Supreme Court's affirmation that strict scrutiny is not "strict in theory, but fatal in fact," this Court cannot conclude that the only constitutional form of

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[21] Interestingly, in *Hopwood*, the Fifth Circuit complained that the precise scope of allowable state action with regard to racial classification remains undefined by the line of Supreme Court cases addressing this issue. For instance, the Fifth Circuit was unsure whether the Constitution permits certain forms of benign racial discrimination to correct "present effects of past discrimination." *Hopwood, supra*, at 949 n.39 (internal quotations omitted). In addition, after having vehemently asserted that "Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications," *id.* at 944, the Fifth Circuit noted that Justice Scalia, who rejects any use of racial sorting to remedy past discrimination, has recognized a compelling state interest to use racial classification to avert a "social emergency." *Id.* at 945 n.26 (quoting *Croson, supra*, at 520 (SCALIA, J., concurring in the judgment)). While the Fifth Circuit lumped Justice Scalia's opinion with the Supreme Court's oft criticized holdings in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 4 (1944), the Fifth Circuit only declined to consider Justice Scalia's "social emergency" compelling state interest because the issue was not presented in their particular case. *Hopwood, supra*, at 945 n.26. That some other compelling state interest besides the provision of a remedy for past or present discrimination could exist was thus left open.

race-conscious decisionmaking must remedy past discrimination. *See Adarand, supra*, at 17 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

2. Compelling State Interest to Operate a Laboratory School

The defendants' interest in operating a laboratory school at UCLA to conduct research relevant to the improvement of the State's public education system through the dissemination and eventual application of such acquired knowledge is compelling. Plaintiff, on the other hand, opposes such a conclusion on the basis that this interest is too amorphous and lacks a requisite strong basis in evidence." *Shaw v. Hunt*, __U.S. __, 116 S. Ct. 1894, 1903 (1996) ("*Shaw II*") (state institution must prove strong basis in evidence to support remedial action); *Croson, supra*, at 497-98 (plurality]; *Wygant, supra*, at 276 (plurality) (holding that societal discrimination, without more, is too indefinite a compelling state interest for imposing a racially classified remedy).

Unlike *Bakke, Wygant, Croson, Metro Broadcasting, Shaw I, Adarand*, and *Shaw II*, this Court need not concern itself with a proffered compelling state interest of remedying the effects of past or present discrimination. Nor do the defendants assert a need to admit a multi-cultural student body for the sole reason that racial diversity, in and of itself, satisfies a compelling state interest. *See, e.g., Bakke, supra*, at 306-07, 315-19 (Powell, J.); *see also Croson, supra*, at 497-99 (rejecting "role-model" theory of diversity). The defendants' interest in operating a laboratory elementary school is only analogous to the use of racial quotas to remedy the effects of past discrimination in that both forms of discriminatory categorization are a necessary instrumentality by which to achieve a beneficial societal goal -- in this case, improved urban education. As such, the Court finds most instructive the Supreme Court's treatment of a similar argument presented by

the Davis Medical School in *Bakke*: that racial set-asides were required to improve the delivery of health-care services to underserved minority communities. *Supra*, at 310-11 (rejecting this supposedly compelling state interest based on the Medical School's inability to demonstrate that its admission policy would have a significant effect on the problem).

Unlike the conclusion reached by the *Bakke* Court, however, this Court believes that the defendants have carried their burdens of: (1) identifying a substantial and worthwhile need to maintain the research conducted at UES; and (2) providing a strong basis in evidence that the use of racial classifications in the UES admission policy is necessary. *See Shaw II, supra*, at 1902-03 (citing *Croson* for the rule that in order to prove a compelling interest for implementing an affirmative action policy, the state must satisfy two conditions: (1) the identification of discrimination; and (2) the furnishing of strong 1evidence that racial considerations are necessary).

The defendants identify, and Plaintiff does not contest, a substantial state interest in maintaining and improving the public education system. The judiciary has long-recognized that a state's need to provide its citizenry with a quality education is compelling. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing "public schools as a most vital civic institution for the preservation of a democratic system of government"); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) ("Public education . . . fulfills a most fundamental obligation of government to its constituency.") (citation omitted); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.").

Of course, the principal purpose of the UES laboratory school is not simply to educate its own student population. As previously discussed, UES's primary mission as a program associated with the UCLA GSE&IS is to conduct research and disseminate information regarding potential innovations in

urban elementary educational methods. The UES Information On Admissions For Fall, 1995[22] describes the school's function as follows:

> The Corinne A. Seeds University Elementary School (UES) is a laboratory of the UCLA Graduate School of Education and Information Studies. As a laboratory school, its primary functions are research on effective educational strategies and dissemination of new knowledge about educational practice to teachers and administrators throughout the state and nation. Seeds UES is also a center for the education and training of teachers and educational leaders.

In addition, all UES applicant's parents are instructed and voluntary [*sic*] accept the fact that some of the studies undertaken by UES researchers may not enure to the particular benefit of their own children. The UES consent form[23] informs potential parents that:

> The Seeds University Elementary School serves, in its central function, as an official University laboratory for research and inquiry in education. In seeking admission of your child to the University Elementary School, you express your acceptance of the fact that your child, if admitted, will be enrolled in an experimental school, in which teaching methods, curriculum, school organization, and children's learning and development will be continually under study. In addition, you express your understanding and acceptance of the risk that, while these studies are carefully designed in the search for improved educational understanding and practice, . . . these studies may or may not yield specific benefit to your child.

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[22] Plaintiff's Exh. 1.

[23] Defs.' Exh. 127.

Strong evidence exists that for UES to carry out its research mission, it must be permitted to admit a student population that presents similar issues and challenges that arise in the ethnically diverse student population now present in the urban school community. An unexhaustive list of such issues and challenges includes limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children.[24]

The Court simply cannot hope to recount each of the particular innovative educational techniques developed at UES, or each of the specific studies conducted at UES, which rely on the diversity of the laboratory school's student population.[25]

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[24] Direct Testimony of Dean Mitchell, ¶ 10, at 6:23-7:5 [hereinafter "Mitchell Direct," etc.]; Handler Direct, ¶ 3, at 19-26 4 (Ph.D. in Educational Psychology from the University of Southern California, and currently Adjunct Professor and Special Assistant to the GSE&IS Dean).

For the sake of convenience, the parties presented their direct testimony in the form of narrative statements and deposition transcripts. During trial, the parties were afforded an opportunity to cross-examine and re-direct the witnesses. The Court also considered each parties' objections, the vast majority of which were filed by Plaintiff, to the opposing parties' narrative testimony and exhibits. For the sake of brevity, and unless otherwise noted, the Court overrules these objections. Suffice it to say that almost all of Plaintiff's objections related to foundation or form, and exposed nothing more than procedural defects which were cured during trial or by the Court's acceptance of the defendants' witnesses as experts in their respective fields.

[25] *See, e.g.*, Megan Franke Direct, ¶¶ 4-6, at 3:10-4:25 (Ph.D. in Educational Psychology from the University of Wisconsin, Madison; Assistant Professor at GSE&IS) (mathematics oriented research); Jeffrey Nelson Direct, ¶ 5, at 3:13-17 (Ph.D. in Educational

(continued...)

Having examined the testimony of the defendants' witnesses, the Court is convinced that without a racially and ethnically diverse student population, the benefits to be gained by these innovations and studies would be lost. The defendants' practical purpose of operating a laboratory school (the actual improvement of the State's urban education system) would be further jeopardized by a marked decrease in the credibility of future studies conducted at UES should the school fail to maintain a student population reflective of the urban environment.[26]

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[25] (...continued)
Administration from the University of California at Santa Barbara; current Director of the New England School Management Program and member of National Faculty of UCLA's School Management Program) (describing attempts to establish a network between UES and the Los Angeles Unified School District's LEARN program); Geoffrey Saxe Direct, ¶¶ 7-8; at 4:1-5:8 (Ph.D. in Developmental Psychology from the University of California, Berkeley; former Chair of the Research Committee at UCLA's Urban Education Study Center; current Professor at GSE&IS) (describing two studies on the effects of California's implementation of a new mathematics curricula); Ronald Gallimore Direct, ¶ 10, at 6:20-7:8:2 (Ph.D. in Psychology from Northwestern University; former founder of the University of Hawaii laboratory school, Bishops Estate; current UCLA professor) (describing peer leadership research conducted at UES). See also Defs.' Exhs. 106 (Urban Education Studies Center Report, June, 1995, at 7-24), 107 (same, 1995-96, at 6-19), 110-12 (Connections, UES publication), & 118 (grant proposal for early childhood bilingual program).

[26] Handler Direct, ¶ 9-10, at 8:5-9:11 ("Appropriate ethnic and racial diversity, as well as diversity within income groups, is also essential if the results of the laboratory school's research are to be effectively disseminated to the public schools."); Stipek Direct, ¶¶ 27-28, at 18:17723:15 ("To provide a 'real world' setting in which new educational practices can be disseminated effectively, UES must have a population of children and families that reflects the diversity of California's urban public schools. Otherwise, what we do at UES has

(continued...)

Furthermore, the Court concludes that strong evidence exists that the research performed at UCLA will help effectuate meaningful change in urban elementary schooling. During trial, the Court heard from a parade of experts about the necessity of a race-conscious admission policy at UES. Each expert's testimony was underscored by the belief that the State must "continue to conduct research on issues involving how children learn and how we can do a better job of teaching them." Handler Direct, ¶ 3, at 3:5-7. Given the nature of problems currently plaguing the urban public school system, especially in the Los Angeles Unified School District, it would be presumptuous to assume that the State already possessed the answers to all of the complex questions about teaching and learning methods. *Id.* at 3:13-26. As the only publicly-funded laboratory school in California, UES plays an integral part in the State's search for ways to improve the quality of urban education.

Finally, contrary to Plaintiff's beliefs, the defendants should not be required to prove that the specific forms of research conducted at 'UES will guarantee improvements in the public education system. Endemic to all research is the possibility that actual results may not correspond with desired outcomes. But the chance that a particular study may yield disappointing results does not defeat the importance of a state's continued research to uncover potential solutions to societal crises. The need for research, despite its inherent uncertainty, is what distinguishes the instant situation from the *Bakke* Court's refusal to conclude that the Davis Medical School had proved a sufficient nexus between reserved minority admission slots and an improvement in minority health care. *Bakke*, *supra*, at 310-11. In this case, the defendants provide a strong basis in evidence that continued research will lead to a greater

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[26] (...continued)
no credibility."). *See also* Defs.' Exh. 117 (list of outside visitors to UES during 1995-96 school year).

understanding of the complex issues surrounding California's urban elementary school system[27] -- even if the defendants cannot guarantee an improvement from the results of each individual study.

D. Narrow-Tailoring

Strict scrutiny review requires an analysis of not only the government's purpose or goal, but also the "means by which that purpose is sought to be obtained. *Adarand, supra*, at 17 ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test."). The narrow tailoring requirement mandates that a State implement its legitimate purpose "by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference." *Wygant, supra*, at 287 (O'CONNOR, J., concurring). Although the Supreme Court has "not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), [it has] always expected that the legislative action would substantially address, if not achieve, the avowed purpose." *Shaw II, supra*, at 1905.

Plaintiff's primary attack on the narrow tailoring of UES's admission policy focuses on the defendants' supposed failure to consider available alternatives to the use of racial and ethnic criteria. Plaintiff asserts that the defendants could achieve the same diverse student population by random sampling or the use of a socio-economic criterion instead of race or ethnic identity. Plaintiff also suggests that UES could obtain an increased number of minority applicants through an outreach program, and that UES's studies could just as effectively be performed in

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[27] *See supra* note 25 (listing examples of specific studies which provide evidentiary nexus between UES and improvements in California's educational system).

the urban public schools in which the research techniques will eventually be implemented. For the following reasons, the Court rejects Plaintiff arguments.

First, the Court believes it would not be possible, nor would it be reasonable, to require the defendants to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications. The Court's feelings are perhaps best summarized by Professor Carollee Howes of the GSE&IS:

> There is a simple rule about being a researcher. You ask a simple question. If you're trying to find a sample that has some distribution of race, you use race as the variable to make that. You don't use an 'approximation or some variable of it.[28]

Random sampling and a socio-economic criterion do not provide an adequate substitute for the use of racial and ethnic identity factors. For instance, despite its concerted effort to increase minority applicants through an outreach program, UES still does not obtain enough Hispanic or Latino applicants to match the percentage of those students currently represented in California's urban elementary schools (37%).[29] Therefore, these alternative admission procedures cannot necessarily ensure the

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[28] Howes Direct, at 44:4-8 (Masters in Child Study from Tufts University; Ph.D. in Developmental Psychology from Boston University; post-doctoral training in social psychiatry at Harvard University).

[29] However, as should be evident from the Court's prior reasoning, UES would not be required to admit 37% Hispanics simply because this is the number represented throughout California's schools. The actual percentage of Hispanic applicants could be modified by the UES Admissions Committee to substantially serve the needs of the school's research purposes. *See Shaw II, supra*, at 1905.

sample student population required by UES's team of researchers.

Second, despite the fact that UES's racial targets are derived from the percentages of ethnic minorities in California's public schools,[30] it would not be reasonable to expect that the percentages of UES minority admittees should exactly correlate with these State-gathered statistics. In reality, the number of students actually admitted into UES's EC-1 class is fairly small, only 46 students. Therefore, each child constitutes over two-percent of the total number of admitted students.[31] The Court need not apply Solomonic wisdom to recognize that UES may not "cut its child-applicants in half" for the purpose of exactly matching its percentage of minority admittees with the percentages of minorities present throughout California's urban schools.

Third, UES's inability to mirror a 'typical" urban school does not undermine the State's compelling interest to conduct research oriented towards improving urban education. The Court questions Plaintiff's contention that UES, in attempting to create a racially diverse research population, must strive to have its percentages of minority admittees reflect a "typical" California urban school. While the Court has already expressed its belief that UES's credibility to effectively disseminate and

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[30] Raymond Lipp, III Direct, at 85:24-86:2 (UES Director of Admissions and Assistant Director of Development).

[31] *See* Stipek Direct, ¶ 41(c), at 31:20-32:4 (describing relation of a 10% "critical mass" of each racial classification to actual percentages of minority students admitted). "The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence. *Bakke, supra*, at 297 (Powell, J.). *See also supra* note 15 (acknowledging the Supreme Court's cautionary advice that the judiciary should afford great deference to research decisions protected by academic freedom and the First Amendment).

implement its innovative educational techniques is dependent upon its diverse student population, the Court is hard-pressed to image a "typical" urban school upon which UES could mirror its admissions. In fact, the Court's concern was best expressed by Gina Brandt, Plaintiff's mother, former President of the UES Family School Alliance ("FSA"). In a 1990 FSA memorandum to Ms. Carlotta Mellon, Assistant Vice Chancellor of UCLA, regarding UCLA's reasons for its proposed relocation of UES,[32] Brandt wrote:

> The larger questions here, however, are whether such a thing as a "typical" setting exists, and whether such a "typical" setting -- if it does exist -- is appropriate for a laboratory school. What is a "typical" urban elementary school in the United States today? New immigrants and new mobility make schools today unlike anything known before, where no place is typical of the whole. The demographics of California and the West are dramatically different from the rest of the nation. Therefore, to suggest that UES is not "typical" begs the question of whether *California* is "typical." What is a "typical" school in Los Angeles? Increasingly, it is a school where no one ethnic group is a majority, where sixteen native languages and dialects may be spoken, and where the demographic profile of this year's students may be radically different from next year's enrollees. Change is the only constant. Research in this context will require maximum flexibility in the structuring of the research design and of the research population. For a laboratory school to be bridled by one neighborhood's patterns of growth and change, in a

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[32] Defs.' Exh. 103, at 3. Plaintiff's objections to the introduction of this document are overruled in so far as the document has probative value to the issue of narrow-tailoring of the UES admission policy. The document is not considered for reasons of estoppel against either Plaintiff or Brandt.

community that is atypical by anyone's standards, would undercut that very flexibility.

Finally, the race and ethnicity-oriented research conducted at UES could not otherwise be performed in the actual urban elementary schools in which the resultant educational techniques may someday be implemented. UES provides a controlled environment where teachers and researchers can control class-size, age groupings among classes, student-teacher ratios, parental influence, and other variables which may affect the credibility of such experiments. Mitchell Direct, ¶¶ 7-8, at 10-27; Handler Direct, ¶ 6, at 5:12-7:5; Gallimore Direct, ¶¶ 8-9, at 5:21-6:18 (specifically describing inability to conduct studies in public schools because of attrition of teachers and school support). A significant inhibitor to the researchers' ability to conduct their experiments directly in the urban public schools is their inability to guarantee needed parental involvement. Because so much of a child's learning is impacted by his or her home life, parents of UES children agree, as an enrollment condition, that they themselves will necessarily become involved in the research. Public schools lack this unique feature of great scientific importance. *See, e.g.*, Handler Direct, ¶ 6(a), at 5:20-6:4 (In public schools, "[y]ou can request cooperation, and you certainly will have some parents who do volunteer. However, you cannot require that parents do a host of things in relationship to their children's education external to what is going on in school itself. As a result, depending on voluntary participation by parents produces additional bias in the study being undertaken through the self-selection involved in volunteering.")

The defendants are not required under the narrow-tailoring doctrine to defend their use of racial and ethnic considerations against all hypothetical alternatives. Rather, the defendants have successfully met the challenge of proving that UES's race-conscious admission policy serves a compelling state interest

without "unnecessarily trammeling" Plaintiff's right to equal protection under the law. *Wygant, supra.*

V. CONCLUSION AND ORDER

The defendants have successfully proven that the use of racial and ethnic identity criteria in UES's admission policy is narrowly tailored to serve the purpose of a compelling state interest. Based on the foregoing findings of fact and conclusions of law, the Court hereby **ORDERS** as follows:

1. Judgment shall be entered for defendants the Regents and Dean Mitchell;

2. Plaintiff shall take nothing in the form of damages or costs in her suit against the defendants;

3. The preliminary injunction entered by the Court on September 8, 1995, requiring Plaintiff's admission to UES is **VACATED**;

4. The defendants are entitled to costs as taxed by the Clerk of the Court.

IT IS SO ORDERED.

DATED: *June 19, 1997*

/S/ DAVID V. KENYON
DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 18 2000
CLERK

(2)

No. 00-135

In The

Supreme Court of the United States

KEELEY TATSUYO HUNTER, a minor, by GINA F. BRANDT, her mother and next friend,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and THEODORE MITCHELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment prohibit researchers at the University of California from using racial and ethnic criteria to select subjects for bona fide research studies regarding primary school education?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. INTRODUCTION 6

II. UES'S ADMISSIONS PROCESS SERVES A COMPELLING GOVERNMENT INTEREST 8

A. This Court's Decisions Strongly Support The Ninth Circuit's Holding That Research On Improvements In Early Education Is A Compelling State Interest 8

1. This Court has Frequently Held that the State's Interests in Both Education and Research Are Compelling 8

2. Educational Research Is a Specific Governmental Interest Which the Ninth Circuit's Decision Makes Clear Cannot Be Used to Justify Race-Based Decision-Making beyond the Narrow Facts of this Case 11

3. This Court's Strict Scrutiny Decisions Make Clear that Remedying Past Discrimination Is Not the Only Compelling Governmental Interest 12

B. The Ninth Circuit's Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals 16

C. The Court Of Appeals Did Not Base Its Opinion On An "Assumption" Of The Validity Of Racial Stereotypes 21

TABLE OF CONTENTS – Continued

Page

III. UES'S USE OF RACIAL SELECTION CRITERIA IS NARROWLY TAILORED TO ACHIEVE ITS RESEARCH GOALS 23

A. The Ninth Circuit's Holding That The UES Admissions Process Is Narrowly Tailored To Promote Its Research Goals Was Based On The Factual Findings Of The District Court..... 23

B. The District Court Properly Found, And The Ninth Circuit Properly Affirmed, That None Of The Alternatives Proposed By Petitioner Would Meet UES's Research Needs..... 25

C. The Ninth Circuit Applied The Appropriate Standard Of Review 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 13, 14, 15, 16, 17, 18

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) 18

Ambach v. Norwick, 441 U.S. 68 (1979) 8

Brown v. Board of Education, 347 U.S. 483 (1954) 8

Bush v. Vera, 517 U.S. 952 (1996) 15

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 11, 12, 13, 14, 15, 16

Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia, 91 F.3d 586 (3d Cir. 1996) 19

Daubert v. Merrell Dow, 509 U.S. 579 (1993) 23

Hopwood v. State of Tex., 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 20, 21

In re Birmingham Reverse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994) 18

Keyishian v. Board of Regents, 385 U.S. 589 (1966) 9, 22

Miller v. Johnson, 515 U.S. 900 (1995) 15

Myer v. Nebraska, 262 U.S. 390 (1923) 8

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 16

New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940 (1st Cir. 1988) 8

O'Donnell Construction Co. v. District of Columbia, 936 F.2d 420 (D.C. Cir. 1992) 18

TABLE OF AUTHORITIES – Continued

Page

Plyler v. Doe, 457 U.S. 202 (1982) 8

Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) 18

Police Ass'n of New Orleans v. City of New Orleans, 100 F.3d 1159 (5th Cir. 1996) 19

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 7, 28

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 9

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 29

Shaw v. Hunt, 517 U.S. 899 (1996) 15

Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989) 16

Sweezy v. New Hampshire, 354 U.S. 234 (1957).. 9, 22, 29

Taxman v. Board of Education of Township of Piscataway, 91 F.3d 1547 (D.C. Cir. 1996) 19

Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999) 20

United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998) 18

University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) 29

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8

Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) 17

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 11, 12, 15

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. § 1983 2

42 U.S.C. § 2000d 2

RULES

Fed. R. Civ. Proc. 52(a) 7, 24, 25, 28

Supreme Court Rule 10 7

Rule 10(a) 21

STATEMENT OF THE CASE

The Corinne A. Seeds University Elementary School ("UES") is a laboratory school operated by the Graduate School of Education and Information Studies ("GSEIS") at the University of California, Los Angeles. Petition, Appendix ("App.") C:1. UES, which is not associated with any elementary public school system, is a unique institution with a unique mission:

> UES's primary mission is as a program associated with the UCLA GSE&IS is to conduct research and disseminate information regarding potential innovations in urban elementary education methods.

App. C:22-23. The 460 students enrolled at UES in pre-kindergarten through sixth grade are research subjects and are covered by all federal, state and university regulations regarding treatment of human subjects. App. C:3, 5.

Students at UES participate in a broad array of important scholarly research into the problems and challenges confronting urban education. As the district court commented, "[t]he Court simply cannot hope to recount each of the particular innovative educational techniques developed at UES, or each of the specific studies conducted at UES, which rely on the diversity of the laboratory school's student population." App. C:24. As examples, the court cited several studies regarding mathematics instruction methods, the effects of California's implementation of a mathematics curriculum, bilingual education and peer leadership. *Id.* at C:24-25, fn. 25.

In order to obtain a scientifically valid research population for these studies, UES selects students on the basis of a number of criteria, primarily socioeconomic background, gender, primary language and race. See App.

C:5-6. Within these criteria, applicants are selected randomly; there are no achievement/ability tests or competitive criteria on which applicants are ranked. *Ibid.* The sole purpose of UES's use of race as a selection criterion is to maintain the scientific validity and credibility of its research. App. C:5.

Petitioner, Keeley Tatsuyo Hunter is a female minor who states her ethnic identity as one-quarter Asian and three-quarters Caucasian. App. C:2. In December 1994, when she was four years old, petitioner's parents submitted an application for her admission to UES's Early Childhood (pre-kindergarten) program for the following fall. Petitioner, who was one of 215 applicants for 46 spaces, was not selected. App. C:4. Petitioner's mother then brought this suit on her behalf, naming as defendants The Regents of the University of California and Theodore Mitchell, then the Dean of GSEIS.[1] After early motions, two claims survived for trial: a claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, against The Regents, and a claim for prospective injunctive relief under 28 U.S.C. § 1983 against Dr. Mitchell.[2] Both claims were based on the contention that use of race and ethnicity as part of the criteria for selecting students to attend UES violated Petitioner's statutory and constitutional rights.[3]

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[1] Petitioner's older sister attended UES. Before petitioner was denied admission, her mother had vigorously defended UES's admissions criteria. App. C:30-31.

[2] Petitioner does not challenge the district court's pre-trial rulings on appeal. In addition, petitioner does not pursue her Title VI claim (the only claim asserted against The Regents of the University of California) in this Petition. See Petition at i, 2.

[3] In light of the strict standard of review applicable to UES's racial classification, at the outset of the case, the district

The district court conducted a two-day bench trial on these remaining claims to determine whether the use of race/ethnicity in the UES admissions process is narrowly tailored to serve a compelling state interest. At the trial, defendants presented the testimony of numerous educational experts and researchers regarding the nature and importance of the research activities conducted at UES. App. C:24-25 & fn. 24, 25, 26.

In addition, substantial evidence from educational experts demonstrated that an ethnically diverse study population is required, both by the nature of the specific research conducted at UES and by the nature of education research generally, to produce scientifically valid results and to disseminate those results effectively to practitioners. App. C:25 & fn. 26. Many of the studies conducted at UES seek to investigate the role, if any, of race in educational outcomes. As examples, the district court identified research on the educational impacts of "limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children." App. C:24. Study of, for example, the potential effect of racial and ethnic conflict in the classroom requires a racially diverse subject population. In addition, the scientific validity even of studies that do not directly seek answers to questions about the role of race require subject populations that are representative of the characteristics, including racial characteristics, of the populations to which their results would be

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court granted petitioner's application for a preliminary injunction requiring her admission to the 1995-96 EC-1 class. It is noteworthy that, despite the court's appropriate initial skepticism, after hearing all of the evidence at trial the court became convinced of the legality of the UES admissions process.

applied. See App. A:9. Because past research has indeed found that ethnicity can be correlated to response to educational approaches, App. A:31 fn. 19, researchers must determine that their results are valid with respect to all ethnic groups as well as be able to study the reasons for those correlations. This requirement of scientific validity is particularly important because UES's research program is intended not simply to gain information for its own sake, but to develop educational strategies that can be applied to heterogeneous, multi-ethnic urban public school classrooms. Thus, the district court found that the "defendants' practical purpose of operating a laboratory school (the actual improvement of the State's urban education system) would be further jeopardized by a marked decrease in the credibility of future studies conducted at UES should the school fail to maintain a student population reflective of the urban environment." App. C:25.

Defendants also presented substantial testimony showing that scientifically valid study populations could not occur by accident: ethnic criteria must be considered in the selection of students to participate in the research conducted at UES. App. C:28. The district court found that "it would not be possible, nor would it be reasonable, to require the defendants to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications." App. C:28.

Petitioner presented *no* witnesses to contradict any of the evidence offered by defendants on these issues. Based on these findings, the district court concluded that the UES admissions process was narrowly tailored to advance the compelling state interest of researching

improvements in urban education, and it entered judgment for the defendants.

Petitioner appealed, and a panel of the Ninth Circuit Court of Appeals affirmed. The court of appeals held that the district court's factual findings regarding the importance of scientifically valid research into the problems of urban education amply supported the conclusion that California has a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools. App. A:5.[4] The court of appeals also affirmed the district court's conclusion that a race-conscious admissions policy was necessary to obtain a scientifically valid research population, and quoted the district court's reference to "a

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[4] Petitioner's claim that the majority based its "compelling interest" holding on "the conclusory statements of two UES administrators" (Petition at 4) mischaracterizes the court's opinion. The majority noted that "[t]he district court heard extensive expert testimony on current problems in public urban education." App. A:5. The district court, in turn, cited substantial expert testimony from numerous researchers and education experts about the importance of the educational research activities conducted at UES. App. C:24-25 & fn. 24, 25, 26. *Petitioner produced no contrary evidence at trial.* Similarly, petitioner's claim that the lower courts failed to "consider whether UES's research actually improved urban education" (Petition at 4) misstates the record. For example, the district court expressly found that "strong evidence exists that the research performed at UCLA will help effectuate meaningful change in urban elementary schooling." App. C:26. It found that "defendants provide a strong basis in evidence that continued research will lead to greater understanding of the complex issues surrounding California's urban elementary school system – even if the defendants cannot guarantee an improvement from the results of each individual study." App. C:26-27.

parade of experts [who testified] about the necessity of a race-conscious admissions policy." App. A:8.[5]

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

As the court of appeals recognized, use of race as a criterion in selection of research subjects is an important and commonly used scientific tool. See App. A:10-11 fn. 11. The court of appeals' decision in this case stands for the narrow and unremarkable proposition that government-supported researchers can use race and ethnicity, among other factors, to select subjects for research studies on primary school education. In reaching that conclusion, the court of appeals applied settled legal principles to the specific factual circumstance of a laboratory elementary school operated by the Graduate School of Education and Information Studies at UCLA. No dispute exists about the applicable legal standard: both the district court and the court of appeals applied strict scrutiny in evaluating petitioner's Equal Protection claim. App. A:3, C:9. Thus both courts required the University to demonstrate that the UES admissions process is narrowly tailored to serve a compelling governmental interest. App. A:3-4, C:9.

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[5] Petitioner also mischaracterizes the basis of the court of appeals' "narrow tailoring" holding by suggesting that the court unquestioningly "deferred" to defendants' judgment without evaluating race-neutral alternatives proposed by petitioner. Petition at 4. On the contrary, both the court of appeals (App A:8) and the district court (App. C:26) referred to extensive expert testimony "about the necessity of a race-conscious admissions policy at UES." See, e.g., App. C:26, 28-31.

In applying this well-established standard, the court of appeals was required to consider that "[t]he district court's conclusion that UES's admissions procedures meet the strict scrutiny test is based on extensive findings of fact. . . . " App. A:4. These included findings that (i) the research into the problems of urban elementary education and their solution conducted at UES has led and will continue to lead to meaningful changes and improvements in urban primary school education, see, e.g., App. C:26; (ii) the scientific validity of that research and the ability to disseminate it effectively to practitioners requires a racially and ethnically diverse student population at UES, App. C:24-25; and (iii) achieving such a valid subject population requires the use of specific racial targets and classifications in the admissions process. App. C:28. The lower courts recited the overwhelming and largely undisputed evidence that supported these findings. See App. A:5-6, C:22-25. The court of appeals also stressed the limited factual scope of its decision and the inapplicability of its holding to different circumstances, in particular, to affirmative action programs or educational programs generally. App. A:7-8. The court of appeals properly reviewed the district court's factual findings under the "clearly erroneous" standard of Fed. R. Civ. Proc. 52(a). App. A:4; *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

In short, the court of appeals' opinion applied well-settled principles of law to well-supported factual findings in a specialized, limited factual context. This case is therefore not appropriate for review by this Court. Supreme Court Rule 10.

II. UES'S ADMISSIONS PROCESS SERVES A COMPELLING GOVERNMENT INTEREST.

A. This Court's Decisions Strongly Support The Ninth Circuit's Holding \That Research On Improvements In Early Education Is A Compelling State Interest.

1. This Court has Frequently Held that the State's Interests in Both Education and Research Are Compelling.

The district court found, and the court of appeals agreed, that "the defendants' interest in operating a research-oriented elementary school is compelling." App. A:6. The Ninth Circuit's "compelling interest" holding is not only factually unassailable, it also is in line with numerous decisions of this Court emphasizing the compelling nature of the governmental interest in both education and promoting academic research. This Court has stated that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "Providing public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). *See also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing "public schools as a most vital civic institution for the preservation of a democratic system of government"); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) ("Public education . . . fulfills a most fundamental obligation of government to its constituency."); *Myer v. Nebraska*, 262 U.S. 390, 400 (1923) (education is of "supreme importance"); *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940, 944 (1st Cir. 1988) (Breyer, J.) ("state's interest in making certain that its children receive an adequate secular education is 'compelling' "). The primacy of education as a government responsibility unquestionably puts the

governmental interest in improving primary education in the "compelling" category.

Similarly, this Court has often expressed the high social, and indeed constitutional, value of promoting freedom of academic research. The First Amendment to the U.S. Constitution holds a "special concern" for academic freedom. E.g., *Regents of University of California v. Bakke*, 428 U.S. 265, 312 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589 (1966); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). An important aspect of academic freedom is maintaining freedom of scientific inquiry and research:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Keyishian v. Board of Regents of New York, 385 U.S. 589, 603, *supra*, quoting *Sweezy*. These decisions recognize that "academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned." *Ibid*. The advancement of knowledge that results from free and open scholarly inquiry benefits society as a whole: "For society's good – if understanding be an essential need of society – inquiries into these problems [posed by the social sciences] must be left as unfettered as possible." *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

The theoretical underpinnings of *Sweezy* and *Keyishian* – that the current state of knowledge is fallible and

that scholarly research in the social sciences can produce tangible benefits for society – was powerfully borne out by the district court's factual findings:

> [T]he Court concludes that strong evidence exists that the research performed at UCLA will help effectuate meaningful change in urban elementary schooling. During trial the Court heard from a parade of experts about the necessity of a race-conscious admissions policy at UES. Each expert's testimony was underscored by the belief that the State must "continue to conduct research on issues involving how children learn and how we can do a better job of teaching them." Handler Direct, ¶ 3, at 3:5-7. Given the nature of problems currently plaguing the urban public school system, especially in the Los Angeles Unified School District, it would be presumptuous to assume that the State already possessed the answers to all of the complex questions about teaching and learning methods. *Id.* at 3:13-26. As the only publicly-funded laboratory school in California, UES plays an integral part in the State's search for ways to improve the quality of urban education.

App. C:26. These findings thus expressly linked the two compelling interests of education and scholarly research. The district court further found, based on extensive expert testimony, that, "without a racially and ethnically diverse student population, the benefits to be gained by these innovations and studies would be lost." App. C:25.

In short, this Court's precedents demonstrate that both education and advancement of knowledge through scientific research are compelling governmental interests. The factual findings of the district court, affirmed by the Ninth Circuit, demonstrate that California does indeed have a compelling interest in the research conducted at UES.

2. Educational Research Is a Specific Governmental Interest Which the Ninth Circuit's Decision Makes Clear Cannot Be Used to Justify Race-Based Decision-Making beyond the Narrow Facts of this Case.

Petitioner asserts that the Ninth Circuit's opinion "conflicts" with *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), because those cases held that certain proposed state interests (the "role model" theory in *Wygant* and the "societal discrimination" theory in *Croson*) were too "amorphous" to be "compelling" under strict scrutiny analysis. Petition at 8. Petitioner claims that the interest in educational research violates this rule because it "could easily 'justify race-based decision-making essentially limitless in scope and duration.' " *Ibid* (quoting *Croson*, 488 U.S. at 498 (plurality opinion)). Petitioner's argument ignores the pains taken by the Ninth Circuit to stress the narrow, fact-bound nature of its holding.

Throughout its opinion, the court of appeals emphasized the uniqueness of the factual context. It began by framing the issue narrowly as "about an elementary school operated as a research laboratory by UCLA's [GSEIS]." App. A:2. It rejected the possibility, suggested by the dissent and repeated by petitioner, that its opinion might be applied broadly to other educational settings by the mere designation of a school as a research enterprise or a mere statement of a research purpose. "It is not UES's *designation* as a laboratory school that justifies its admission process." App. A:7. "[A] mere statement from a governmental entity that it is committed to research, without more, would not be sufficient to establish a compelling interest." App. A:8. Rather, the court emphasized

the unusual and bona fide nature of UES's research mission and activities, the extensive amount of research that really does take place there, the substantial commitment of resources to research, and the impressive number of research personnel working at UES. App. A:7-8.[6] The court concluded that "[a]ll of these characteristics make UES an *exceptional* school and a valuable resource to California's public education system." App. A:8 (emphasis added).

The contrast between the interest approved by the Ninth Circuit here and the interests rejected by this Court in *Wygant* and *Croson* is obvious. Both the "role model" and "societal discrimination" interests were virtually a blank check for application of racial classifications in all governmental activity. In contrast, the Ninth Circuit's holding is expressly limited to the narrow context of a bona fide, University-run research school with the same characteristics as UES.

3. This Court's Strict Scrutiny Decisions Make Clear that Remedying Past Discrimination Is Not the Only Compelling Governmental Interest.

Petitioner's primary argument, here as below, is her inaccurate claim that this Court has held that remediation of past discrimination is the *only* government interest that can support racial classifications. On its face this notion is illogical, suggesting that this Court has held, as a matter of law, that remedying past discrimination, as important as it may be, is always the most compelling possible

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[6] The evidence of the bona fide nature of UES's research mission and activities is overwhelming, App. C:24, and petitioner has never contested it.

national goal, above maintenance of domestic order, protection of public health and welfare or providing a national defense, no matter what the circumstances.[7] Petitioner's view is also inconsistent with the essential character of strict scrutiny review, which this Court has emphasized is not a rigid, mechanical test. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995), the Court emphasized that strict scrutiny is *not* "strict in theory, but fatal in fact," and that it does *not* "treat

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[7] As a belated recognition of the implausibility of the claim that no other governmental interest could rise to be as "compelling" as remedying past discrimination, petitioner attempts to incorporate Justice Scalia's concurrence in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521, *supra*, (Scalia, J., concurring in result), to broaden the permissible scope of "compelling" interests to include "a social emergency rising to the level of imminent danger to life and limb." Petition at 7. This attempt to add plausibility to petitioner's argument totally undermines it. Petitioner's contention is based on a rigid reading of the *Croson* plurality opinion in which, it is claimed, the plurality held that racial classifications must be "strictly reserved for remedial settings" in all contexts. Petition at 7, quoting *Croson*, 488 U.S. at 493. The language relied upon, if read as petitioner urges, includes no room for exceptions, such as "imminent danger of life and limb." Thus, Petitioner's expansion of possible "compelling" interests to include "imminent danger" recognizes that her reading of *Croson* is wrong: racial classifications are *not* to be reserved only for remedial settings. Petitioner's citation to Justice Scalia's concurrence is doubly ironic because the point of the passage quoted is that remedying past discrimination is *not*, in Justice Scalia's opinion, a permissible ground for States to classify individuals on the basis of race. *Id.* at 521-23. Finally, it is important to recognize that, like the *Croson* plurality opinion, Justice Scalia's concurrence was in the context of a contracting affirmative action case, and cannot be read broadly to apply to all contexts not before him.

dissimilar race-based decisions as though they were equally objectionable."

> "[S]trict scrutiny *does* take 'relevant differences' into account – indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision-making."

Id. at 228 (original emphasis). Thus, this Court has explained that the outcome of strict scrutiny review depends on context and the evidence presented in each case.

Petitioner's contrary claim that strict scrutiny allows but one "compelling interest" is based entirely on cobbling together bits and pieces of language from various equal protection opinions, while ignoring the cases' holdings and context. This semantic exercise is possible only because during the past 25 years nearly all cases applying the Equal Protection Clause to racial classifications have involved challenges to affirmative action programs. In those cases, the Court has rejected non-remedial justifications and has been required to analyze closely whether justifications claimed to be remedial truly were. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 *supra*. But this line of cases has simply not considered what government interests might be "compelling" in other non-affirmative action situations.

The primary example of petitioner's method of argument is where she plucks, out of context, language from Justice O'Connor's plurality opinion in *Croson*, 488 U.S. at 493: "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of

racial inferiority and lead to politics of racial hostility." Petitioner nonsensically claims that the plurality in this passage intended to reject all possible non-remedial justifications in all possible contexts, even though none of those justifications or contexts was before the Court.[8] In fact, Justice O'Connor was writing in reaction to a minority contractors set-aside program that was labeled "remedial" but which was justified by reference to generalized, historic, societal discrimination. Her warning must be considered in that context, as Justice O'Connor herself explained writing for the Court in *Adarand*, 515 U.S. at 228 ("Strict scrutiny does not 'trea[t] dissimilar racebased decisions as though they were equally objectionable.").[9] In the present context, for example, there is little reason

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[8] The claim that Justice O'Connor meant to suggest that no non-remedial interest could ever justify a racial classification is particularly unlikely since, just three years earlier, she recognized that "[a]dditionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use for racial considerations in furthering that interest." *Wygant v. Jackson*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring). And, seven years after *Croson*, Justice O'Connor wrote that the States "have a compelling interest" in attempting to comply voluntarily with the anti-dilution provisions of section 2(b) of the Voting Rights Act. *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring).

[9] Subsequent decisions of this Court show that it did not intend *Croson* to reject any non-remedial interests, even ones that were not raised there. In *Shaw v. Hunt*, 517 U.S. 899, 911 (1996) and *Miller v. Johnson*, 515 U.S. 900, 921 (1995), this Court left open the question whether a specific non-remedial interest (compliance with the Voting Rights Act) could justify race-based classifications. This reservation would have been unnecessary had this Court already held in *Croson* that *no* non-remedial interests are "compelling," as petitioner contends.

to believe that racial selection of study participants for research purposes in a non-merit based process will "lead to notions of racial inferiority," nor would it be likely to "lead to politics of racial hostility" that the *Croson* plurality feared in the context of racial contracting preferences. Strict scrutiny requires that such differing contexts be taken into account. As Justice O'Connor's *Adarand* opinion instructs (see above), arbitrarily limiting "compelling" governmental interests to a single category, regardless of context, is inconsistent with the rationale of strict scrutiny.

Furthermore, in other areas of constitutional analysis, such as under the First and Fourth Amendments, where "strict scrutiny" review is also employed to protect individual rights, this Court has recognized a variety of governmental interests as "compelling," e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) ("Government has a compelling interest in ensuring that front-line [drug] interdiction personnel are physically fit, and have unimpeachable integrity and judgment."); *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 628 (1989) (state interest in avoiding railroad accidents is "compelling."). This Court has simply never expressed the sort of absolutist view of compelling interests that petitioner advances.

B. The Ninth Circuit's Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals.

The Ninth Circuit's holding that educational research is a compelling interest does not, as petitioner claims (Petition at 9), conflict with other circuits' decisions for the simple reason that no other circuit has addressed the

issue. Once again, petitioner's method is to pluck language from various court of appeals decisions entirely divorced from its context (usually a challenge to claimed remedial affirmative action programs), and to contend that statements meant to reject a particular non-remedial interest in a particular circumstance apply to all non-remedial interests in all circumstances. As Judge Posner wrote for the Seventh Circuit in *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (holding that racial considerations may be applied to prison staff hiring), such statements do not create a meaningful "conflict":

> [T]here is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him. The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison's staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for the discrimination and expressed that rejection in the sweeping dicta that we have mentioned. The weight of judicial language depends on context, by these plaintiffs ignored.

Petitioner's interpretation of these court of appeals decisions – as rigidly holding that only a remedial interest is compelling under any and all circumstances – should also be rejected because it would put them in sharp conflict with the very essence of the strict scrutiny standard described in *Adarand*. Such an inflexible rule developed in one context and applied to all others is the

opposite of "tak[ing] 'relevant differences into account,' " which this Court has described as the "fundamental purpose" of strict scrutiny. *Adarand*, 515 U.S. at 228.

In any event, none of the court of appeals decisions petitioner cites in fact claims to impose uniform limits on compelling interests applicable to all circumstances:

- Far from holding that only remedial interests could be compelling, the Fourth Circuit in *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992), recognized that a non-remedial rationale (student diversity) might be compelling, but held that it had not been shown to justify the particular racially restrictive scholarship program at issue there. *Id.* at 56, fn. 4.
- In *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), the Sixth Circuit did not purport to dismiss all non-remedial governmental interests; rather, it held that, where a remedial interest is offered, it cannot be based on "societal discrimination alone," but must be supported by "evidence of prior discrimination by the governmental entity involved." *Id.* at 1162-63.[10]
- The language petitioner extracts from both *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1544 (11th Cir. 1994), and *O'Donnell Construction Co. v. District of Columbia*, 936 F.2d 420, 424 (D.C. Cir. 1992), also involves only the manner in

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[10] Furthermore, since *Aiken*, the Sixth Circuit has expressly held that non-remedial interests may support racial classifications. *United States v. Ovalle*, 136 F.3d 1092, 1106 (6th Cir. 1998) (holding that "creating a jury pool that represents a fair cross section of the community is a compelling governmental interest," but rejecting the particular plan at issue as not narrowly tailored).

which courts must analyze governmental interests that are claimed to be remedial in the context of minority contractor preferences, and does not address non-remedial interests that might or might not support racial classifications in entirely different circumstances.

- The Third Circuit in *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), far from announcing a general rule of universal application, prefaced the very passage quoted in the Petition (at 12) by noting the specific context: "[t]he current law of the land *concerning the Equal Protection Clause and municipal, race-based, affirmative action programs* is set forth in [*Croson*]." *Id.* at 596.
- Similarly, the D.C. Circuit in *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (D.C. Cir. 1996), in a passage not fully quoted by petitioner, stated that the defendant had conceded that "there is no caselaw approving [promotion of racial diversity among teachers 'for education's sake'] *to support an affirmative action plan under Title VII.*" *Id.* at 1558.
- The Petition's quotation of *Police Ass'n of New Orleans v. City of New Orleans*, 100 F.3d 1159, 1168 (5th Cir. 1996), similarly deletes the important contextual limitation in the Fifth Circuit's opinion. Far from holding, as petitioner suggests, that *all* "racial classifications 'must be narrowly tailored to remedy past specific instances of discrimination' " (Petition at 10), the full quotation from the opinion is that "*an affirmative action plan* must be narrowly tailored to remedy past specific

instances of discrimination." *Ibid.* (emphasis added).

- Petitioner's citation to *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999), is particularly misleading, since in that case the court explicitly *assumed* that the non-remedial goal of diversity in education was "compelling" but found that the racial preference scheme at issue there was not narrowly tailored to meet that goal. *Id.* at 705.

None of these cases purported to reject non-remedial interests in circumstances not before the courts, and none presents a conflict with the Ninth Circuit's decision here.

This leaves the Fifth Circuit's decision in *Hopwood v. State of Tex.*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), which involved a challenge to the University of Texas Law School's use of affirmative action in admissions. In *Hopwood*, the Fifth Circuit rejected Texas's claim that the goal of "obtaining the educational benefits that flow from a racially and ethnically diverse student body," *id.* at 938, constituted a compelling state interest. *Id.* at 944-96. The actual *holding* of *Hopwood* did not go beyond rejection of the diversity rationale in an affirmative action context. Nevertheless, in analyzing the question, the Fifth Circuit stated that:

> "the [Supreme] Court *appears* to have decided that there is *essentially* only one compelling state interest to justify racial classifications: remedying past wrongs."

Id. at 944 (emphasis added). *Hopwood* does not present a conflict with the Ninth Circuit decision in this case that justifies *certiorari* review. First, even on its own terms, *Hopwood's* supposed rejection of non-remedial interests was neither definitive nor absolute ("appears," "essentially"). Second, *Hopwood* did not hold, because it did not consider, that the interest in operation of a research-

oriented elementary school was not compelling. To the extent *Hopwood's* speculation about this Court's Equal Protection holdings can be read to extend beyond the affirmative action context, it is necessarily *dictum*.

C. The Court Of Appeals Did Not Base Its Opinion On An "Assumption" Of The Validity Of Racial Stereotypes.

Petitioner's claim that the Ninth Circuit based its decision on assumptions of the validity of racial stereotypes fundamentally misconstrues both the court's decision and the method of science. In fact, the Ninth Circuit did not, as the Constitution does not, assume the answer to any scientific question. On the contrary, its decision is based on the importance of allowing scientists the tools necessary to obtain a better understanding of issues regarding the education of our youngest citizens.

Petitioner seizes on the words "different learning styles" to suggest that the court of appeals' decision depends on the "assumption" that there is a racial difference in "learning styles." Reading the passage in context reveals how remarkably petitioner misunderstands – indeed, virtually inverts – the court of appeals' reasoning. The Ninth Circuit was, in fact, quoting the district court's "unexhaustive list" of the issues and challenges facing urban education that are studied at UES. This list included "limited language proficiency, different learning styles,[11] involvement of parents from diverse cultures with different expectations and values, and racial and

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[11] Neither the court of appeals nor the district court stated that the "different learning styles" it referred to were race-based. Petitioner *assumes* that the courts were referring to the possibility of a racial difference in learning styles.

ethnic conflict among families and children." App. C:24. These are not *assumptions* on which UES's research is based, but *questions* it seeks to answer through research. As the district court found, by selecting a racially and ethnically diverse student population, UES creates the conditions necessary to study these and other issues, but consistent with the method of science it does not "assume" what the answers to those questions will be.

Indeed, it is *petitioner* who seeks to impose assumptions about the role, or lack of role, of race in education, assumptions that she contends must be accepted by government-sponsored science. Petitioner would impose a politically-correct orthodoxy that bars publicly-funded researchers from studying questions of race and racial difference, because, she claims, the Constitution effectively does not allow some questions to be asked. In petitioner's view, the Constitution requires scientists, at least those supported by government funding, to conclude that race and ethnicity are not correlated to educational outcomes.[12] On the contrary, the Constitution rejects rather than imposes a "pall of orthodoxy" over academic inquiry. *Keyishian*, 385 U.S. at 603. It does not, as petitioner claims, compel scholars to assume that race and ethnicity do not influence primary education; rather, it allows and encourages them to study such scientific questions. *See ibid; Sweezy v. New Hampshire*, 385 U.S. at 250-51. "The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be

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[12] Since there is scientific evidence that race *is* correlated with educational outcomes, App. A:31 fn. 18, presumably petitioner's view of the Constitution requires that this evidence be ignored, even at the cost of producing false results.

so, and that in itself is an advance." *Daubert v. Merrell Dow*, 509 U.S. 579, 597 (1993). Petitioner's argument regarding "assumptions" on which the Ninth Circuit's decision is based is a straw man that provides no basis for certiorari review.

III. UES'S USE OF RACIAL SELECTION CRITERIA IS NARROWLY TAILORED TO ACHIEVE ITS RESEARCH GOALS.

The Petition's attack on the Ninth Circuit's "narrow tailoring" holding, like its challenge to the "compelling interest" holding, is an attempt to recharacterize a relatively narrow, fact-bound issue as a broad legal dispute appropriate for this Court's review.

A. The Ninth Circuit's Holding That The UES Admissions Process Is Narrowly Tailored To Promote Its Research Goals Was Based On The Factual Findings Of The District Court.

Petitioner's challenge to the court of appeals' "narrow tailoring" holding ignores the intensely factual nature of that decision. Both the district court's and the Ninth Circuit's narrow tailoring holdings were based, not on some broad legal conclusions, but on the finding, based on substantial evidence, that *in this case* the alternatives to racial admissions targets proposed by plaintiff at trial would not, in fact, result in the conditions necessary to conduct research at UES. As the Ninth Circuit framed the issue at the beginning of its discussion, "the question was whether the district court correctly concluded that '[t]he defendants have successfully proven that the use of racial and ethnic identity criteria in UES's admissions policy is *narrowly tailored* to serve the purpose of a compelling state interest.' " App. A:8. The Ninth Circuit's

opinion focuses on the factual finding of the district court that, indeed, a race-conscious admissions policy was necessary to perform important research at UES. The court of appeals quoted the district court's reference to "a parade of experts [who testified] about the necessity of a race-conscious admissions policy at UES." App. A:8. It gave specific examples of expert testimony describing the reasons race must be used explicitly to select students in order to obtain the proper subject population for research. App. A:9. And it concluded that *"[b]ased on the evidence in the record,* we agree with the district court's determination that UES's use of race/ethnicity in its admissions process is narrowly tailored to achieve the necessary laboratory environment." App. A:11 (emphasis added).

Given the factual nature of the district court's narrow tailoring finding, the Ninth Circuit was, and this Court is, required to afford it substantial deference. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. Proc. 52(a). Applying this standard, there is utterly no basis to disturb the district court's finding. In response to the extensive evidence referred to by both courts on the need for race-based selection, *petitioner offered no contrary evidence at trial,* but was content merely to cross-examine defendants' witnesses, hoping to shake their credibility. The district court's finding that the University's witnesses were credible is neither subject to challenge on appeal nor an appropriate issue for this Court's review.[13]

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[13] Ignoring the review standard applicable to the district court's fact-finding, petitioner attempts to dismiss the evidence

B. The District Court Properly Found, And The Ninth Circuit Properly Affirmed, That None Of The Alternatives Proposed By Petitioner Would Meet UES's Research Needs.

As discussed above, the district court found, as a factual matter and based on uncontroverted evidence, that a racially diverse subject population is necessary for the important research taking place at UES. App. C:24-25. The court also found that it would not be possible for defendants to achieve this racial diversity without the use of specific racial targets and classifications. App. C:28. In addition to arguing with the extensive and uncontroverted evidence on which the district court relied for these findings, petitioner here, as she did at trial, see App. C:27, claims that the UES admissions process is not narrowly tailored because hypothetical, supposedly

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from a "parade of experts" on which the court relied by noting that two of the three experts referred to by way of example in the Ninth Circuit's opinion were University employees and by labeling their testimony "conclusory." Petition at 23-24. But it is for the district court to determine the credibility of the University employees as witnesses. Fed. R. Civ. Proc. 52(a). Furthermore, even in the brief excerpts from much more extensive testimony quoted by the court of appeals, the University's witnesses did not merely offer "conclusions" of the need for explicit racial admissions criteria, but provided specific reasons for their opinions that alternatives could not achieve UES's objectives. See, e.g., App. A:9 (quoting testimony of Dr. Howes that scientific validity requires direct use of variables at issue in selection and that small sample size requires explicit consideration of race to achieve proper subject populations and quoting Dr. Stipek that random selection could not obtain a population that balances race with all other necessary characteristics).

"race-neutral" alternatives might achieve the same goals.[14]

At trial, petitioner merely hypothesized a series of potential alternatives without *any* evidentiary showing that her alternatives would meet UES's need for ethnic diversity or the other requirements of its research program. The district court addressed these alternatives at length, and, based on the testimony of the University's many experts, concluded that none would meet UES's research needs. App. C:27-32.[15] The district court found

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[14] The supposed "race-neutrality" of these alternatives – which involve such suggestions as relocating UES to a more ethnically diverse neighborhood or mandating laboratory conditions in public schools throughout California – is in any event illusory. Given the need for a racially diverse study population, petitioner's alternatives are merely attempts to reduce the *appearance* of race-based decision-making while achieving the same pre-determined, required student racial profile. Decisions such as where to relocate the school or in which public schools to establish laboratory conditions would have to be made based on the *race* of the resulting student body; otherwise they would *not* achieve UES's research objective for a racially diverse subject population. Choosing an entire school on the basis of its existing racial composition would effectively deny the benefits of the laboratory program to all other students on the basis of race. Such decisions would be every bit as much race-based as UES's current admissions process. No constitutional value is advanced by such attempts merely to conceal the race-based nature of the subject selection process.

[15] For this reason the lower courts' decisions here do not conflict with the decisions of other circuits, as petitioner claims. Petition at 22-26. All of the decisions petitioner cites were fact-based determinations that, on the evidence presented in those cases, the challenged racial classifications were not narrowly tailored to achieve the compelling interest at issue. In contrast, here, after a searching inquiry and based on the substantial evidence presented at trial, the district court found, and the

generally that, by seeking to disguise the racial nature of subject selection by substituting "markers" (such as location or socioeconomic status) for race, such alternatives would undermine the scientific validity of the research. The court cited one expert who testified:

> There is a simple rule about being a researcher. You ask a simple question. If you're trying to find a sample that has some distribution of race, you use race as the variable to make that. You don't use an 'approximation' or some variable of it.

App. C:28. In addition, the district court found, based on the evidence presented at trial, that other methods would not be able to ensure the sample student population required for UES's research activities, App. C:28-29, and that the type of research activities conducted at UES could not be performed at another school, such as a public school, not dedicated to research. App. C:31. The lower courts' rejection of petitioner's "alternatives" was based on substantial evidence presented at trial and is not a matter appropriate for this Court's review.[16]

Ninth Circuit affirmed, that the University *had* demonstrated that in *these* circumstances its admissions process was narrowly tailored to advance the specific compelling interest of researching improvements in urban education. The fact that other circuits reached different results on different facts in entirely different contexts does not constitute a "conflict" requiring this Court's review.

[16] Petitioner also inaccurately contends that the lower courts' decisions conflict with decisions of other circuits by failing to require that the University has considered alternative means of achieving needed racial diversity before it implemented racial classifications. Petition at 26-27. First, as the district court found, UES *did* consider various alternatives and found that they did not achieve the necessary study

C. The Ninth Circuit Applied The Appropriate Standard Of Review.

Petitioner's complaint that the Ninth Circuit applied a "deferential" standard of review to the narrow tailoring issue mischaracterizes both the law and the court's decision. First, it is quite clear that the Ninth Circuit, as had the district court, applied the very non-deferential standard of strict scrutiny to its overall review of the UES admissions process. App. A:3-4. Petitioner's claim that the Ninth Circuit applied a "deferential" standard is based on the court's statement, in the context of reviewing the district court's factual finding that petitioner's (and the dissent's) hypothetical alternatives could not achieve a subject pool with the necessary ethnic characteristics, that "courts should defer to researchers' decisions about what they need for their research." App. A:10-11.

First, as noted above, the Ninth Circuit was *required* to apply a deferential standard of review to these factual findings. Fed. R. Civ. Proc. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273, 287.

Second, the reference in the court of appeals' opinion on which petitioner seizes was simply a recognition by the court that, in light of the one-sided, indeed *uncontroverted*, nature of the evidence regarding the subject population necessary at UES and the means necessary to attain it, the court should not impose its own, non-expert view of how to conduct valid scientific research. The

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populations. App. C:28 (minority outreach), 30-31 (relocation). Furthermore, the court also found that many of plaintiffs' proposed alternatives were inherently unable to achieve UES's research goals. E.g., App. C:31 (not possible to conduct effective research in public schools).

court of appeals did no more than echo the oft-stated reticence of this Court to substitute its opinion on matters of the conduct of science for those of scientists. In *University of Pennsylvania v. EEOC*, 493 U.S. 182, 199 (1990), this Court repeated its caution that "judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment." Quoting *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *see also Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring) (academic inquiries "must be left as unfettered as possible").[17] In making this comment, the Ninth Circuit referred to examples of the many types of scientific research in which, like the research conducted at UES, ethnic criteria are essential in selecting subject populations. App. A:10-11 fn. 11. The court was rightfully concerned about issuing uninformed pronouncements regarding the need for such protocols that would undermine the ability of scientists to conduct valuable research.

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[17] Petitioner (Petition at 21-22) criticizes the Ninth Circuit's citation to *University of Pennsylvania v. EEOC* on the ground that in that case this Court noted that, because the University of Pennsylvania did not contend that race, sex and national origin constituted "academic grounds" on which to make faculty promotion decisions, an attempt by the University to withhold certain documents from the EEOC during an investigation of alleged Title VII violations was too remote from a genuine academic decision to warrant such deference. See 493 U.S. at 198-99 & fn. 7. In contrast, here, as extensive evidence in the record demonstrates, the decision about the race, sex and national origin of subjects to include in a study of urban education is centrally an academic judgment which the courts should be most reluctant to second-guess.

The Ninth Circuit did not suggest that the assertions of scientists about their research needs should be uncritically accepted by the courts nor that the stated needs of researchers trumped all constitutional limitations. On the contrary, both the district court and Ninth Circuit engaged in a searching review of the justifications for race-based selection put forward by the University.[18] The Ninth Circuit merely recognized that where, as here, testimony regarding the needs of scientific research is strong and undisputed, courts do not have the scientific expertise to disregard it and to impose their own view of what researchers need to conduct their investigations. Nothing about that observation warrants review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: August 18, 2000

Respectfully submitted,

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[18] See, e.g., App. A:7-8 (looking beyond UES's *designation* as a laboratory school and its *stated mission* of educational research and examining closely the bona fide nature of UES's research activities).

Supreme Court, U.S.
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No. 00-135

In the

Supreme Court of the United States

KEELEY TATSUYO HUNTER, a minor,
by GINA F. BRANDT, her mother and next friend,
Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and THEODORE R. MITCHELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. NO PAST RESEARCH FOUND THAT ETHNICITY CAN BE CORRELATED TO RESPONSE TO EDUCATIONAL APPROACHES 1

II. THE NINTH CIRCUIT HOLDING IS NOT LIMITED TO A UNIVERSITY-RUN RESEARCH SCHOOL 3

III. THE LOWER COURTS FOUND THAT DIFFERENT LEARNING STYLES WERE RACE-BASED 4

IV. THE STATE MAY STUDY BUT NOT AWARD BENEFITS BASED ON RACIAL DIFFERENCES 5

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998) 3

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.6, Petitioner Keeley Tatsuyo Hunter files this reply to the Opposition to Petition for Writ of Certiorari (Opposition) filed by Respondents Regents of the University of California and Theodore Mitchell in order to address new points raised therein.

I

NO PAST RESEARCH FOUND THAT ETHNICITY CAN BE CORRELATED TO RESPONSE TO EDUCATIONAL APPROACHES

Respondents seek to justify the race quotas in issue by raising the following new point: "Because past research has indeed found that ethnicity can be correlated to response to educational approaches, App. [Appendix] A:31 fn.19, researchers must determine that their results are valid with respect to all ethnic groups as well as be able to study the reasons for those correlations." Opposition at 4.

Respondents' citation is to the dissenting opinion of Judge Beezer which directly contradicts Respondents' premise. Judge Beezer found:

> Appellees [Respondents] appear to believe that a child's race and ethnicity is somehow linked to a distinct "learning style," [footnote omitted] and that these supposed cognitive differences between the races call for study. *However, none of appellees' evidence concretely demonstrated the existence of an ineluctable connection between any particular race/ethnicity and any particular "learning style."* Fn. 19.

App. A:31 (emphasis added).

Footnote 19 further clarifies the matter:

> The district court did not make a specific finding on this discrete question. The closest it came was to make the undifferentiated statement that an ethnically diverse student population presents "issues and challenges [that] include[] limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values and racial and ethnic conflict among families. *Hunter*, 971 F.Supp. at 1328-29. To the extent that this statement could be construed as containing a finding of fact that any particular race/ethnicity is inextricably linked to any particular "learning style," such a finding is, on this record, clearly erroneous. More broadly, the "premise that differences in race . . . reflect real differences . . . is utterly irrational and repugnant to the principles of a free and democratic society." *Metro [Broadcasting, Inc. v. Federal Communications Commission,]* 497 U.S. [547] at 618 [1990] (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) (internal quotation marks omitted).

App. A:31-32 n.19 (brackets in original).

The authority cited by Respondents makes clear that no research has found that ethnicity can be correlated to the response to educational approaches.

Respondents misunderstand Petitioner's position in claiming that the Ninth Circuit was required to apply a deferential standard of review under Federal Rule of Civil Procedure 52(a) to the district court's findings on the propriety of racial quotas. Opposition at 28. What Petitioner objects to is the Ninth Circuit's deference to Respondents on this constitutional issue.

> Finally, in evaluating whether UES's use of race/ethnicity in its admissions process is narrowly tailored, we recognize, as did the district court, that courts should defer to researchers' decisions about what they need for their research.

App. A:10.

This holding by the Ninth Circuit expressly conflicts with the First Circuit's ruling in *Wessman v. Gittens,* 160 F.3d 790 (1st Cir. 1998), explicitly rejecting the argument that courts should "defer[] to school officials' determinations anent the racial and ethnic composition of the student body," and holding that "constitutional principles cannot take a back seat to the discretion of local school officials in respect to matters such as the racial composition of student bodies." *Id.* at 797 n.3. The Ninth Circuit's ruling that the courts should defer to one of the litigants on a constitutional issue is shocking it its potential application.

II

THE NINTH CIRCUIT HOLDING IS NOT LIMITED TO A UNIVERSITY-RUN RESEARCH SCHOOL

Respondents raise a new point that "the Ninth Circuit's holding is expressly limited to the narrow context of a bona fide, University-run research school with the same characteristics as UES [University Elementary School]." Opposition at 12. Respondents are not able to cite any language incorporating this "express" standard. What the Ninth Circuit actually said was:

> The district court found that (1) California had a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools, and (2) UES' consideration of race/ethnicity in its

> admissions process was narrowly tailored to further that interest. *We affirm.*

App. A:3.

Thus the compelling state interest was not limited to "bona fide, University-run research school[s] with the same characteristics as UES." Rather, the state need merely claim that the school utilizing race quotas is "a research-oriented elementary school dedicated to improving the quality in urban public schools." This is a standard that could be met by any urban public school through the simple device of having some official dub it as "research-oriented" and "dedicated to improving the quality of education." (In passing, one would hope that all of the state's schools are "dedicated to improving the quality of education.") In summary, this is a standard so broad that almost any urban school could meet it and thus it is no standard at all, but a license to impose race quotas at the whim of school officials.

III

THE LOWER COURTS FOUND THAT DIFFERENT LEARNING STYLES WERE RACE-BASED

Respondents state: "Neither the court of appeals nor the district court stated that the 'different learning styles' it referred to were race-based." Opposition at 21, n.11. That would come as a surprise to those courts. The very phrase "different learning styles" came from the testimony of Professor Stipek who made clear it referred to racial differences. As noted by the dissent:

> According to Professor Stipek, one of appellees' expert witnesses at trial, "[e]thnicity is an important variable in research related to education because there is evidence that *children with different ethnic backgrounds often have different learning styles* . . . .

App. A:31 n.18 (emphasis added).

Dr. Stipek was one of the expert witnesses the Ninth Circuit relied on in reaching its holding. App. A:5 n.5. In any event, it was the Ninth Circuit and the district court who relied on the race-based "different learning styles" to justify the imposition of Respondents' race quotas. App. A:5.

IV

THE STATE MAY STUDY BUT NOT AWARD BENEFITS BASED ON RACIAL DIFFERENCES

Respondents state: "Petitioner would impose a politically-correct orthodoxy that bars publicly-funded researchers from studying questions of race and racial difference, because, she claims the Constitution effectively does not allow some questions to be asked." Opposition at 22. Respondents give no cite for this straw claim nor could they. This case is not about asking questions or studying alleged race-based differences. It is about denying the benefits of admission to a state-run school based on the applicant's race.[1] That is the issue before this Court.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari, as amplified in this reply brief, Petitioner

[1] That admission to UES is a benefit is shown by the district court's finding that the school uses the admissions process "to further the mission of UES and to advance the interests of UCLA, including recruiting faculty and staff for the University." App. C:7. That is, UCLA used admission to UES as a tool for recruiting faculty and staff through the perquisite of a superb education.

respectfully requests that this Court grant her Petition for Writ of Certiorari.

DATED: September, 2000.

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